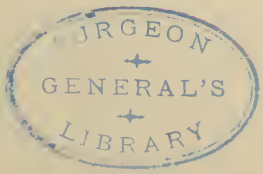
LAW FOR THE DENTIST

"Law for the Dentist"

by

Leslie Childs



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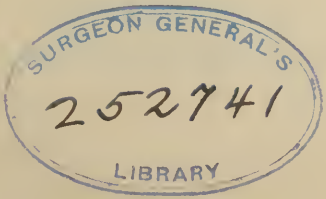

Contents.

CHAPTER I.

Right of Unlicensed Person to Own and Operate a Dental Office.

THE right of a State to prescribe qualifications for those seeking to practice dentistry has been generally upheld by the courts. This on the broad theory that the actual work of dentistry required peculiar knowledge and skill, and the public was entitled to this protection from unqualified or incompetent persons who might seek to practice this profession if certain standards were not insisted upon.

So far so good, and so long as the lawmakers have confined such regulations to those seeking to personally practice dentistry they have been upheld. But when such acts have gone beyond this, and sought to enforce the same requirements upon one merely seeking to own or operate a dental office, they have not fared so well at the hands of the courts. This on the grounds that the reasons for the enforcement of cer-

tain qualifications upon those seeking to personally practice dentistry, did not apply where the mere right to own or operate a dental office was claimed.

Perhaps the leading case on the subject is State vs. Brown, 37 Wash. 635. And while this is not the latest decision on the point, yet owing to the facts involved and the clear reasoning of the court in deciding the question at issue, it becomes an interesting and valuable case. The circumstances leading up to the action were substantially as follows:

Statute Forbids Unlicensed Person To Own Dental Office.

The Washington Legislature passed an act which, greatly abbreviated, provided as follows:

> Any person . . . . seeking to practice dentistry in the State of Washington, or to own, operate or cause to be operated, or to run or manage a dental office . . . . shall file his or her name, together with an application for examination, with the secretary of the State Board of Dental Examiners, and . . . . undergo examination before that body . . . . Any person who, ... shall own, run, operate or cause to be operated, or manage a dental office . . . . with-

out having first filed for record . . . . a certificate from said board of dental examiners . . . . shall be deemed guilty of misdemeanor . . . .

Brown the defendant was tried and convicted under this statute for owning and operating a dental office. From the judgment of the lower court he prosecuted an appeal to the Supreme Court of Washington. In stating the question before it for decision the court, among other things, said:

> The question is now presented as to the power of the legislature to enact a law requiring an examination by and license from the State Dental Board, as a prerequisite to "owning, running and managing a dental office or department." Appellant (Brown the defendant) contends that this is an unwarranted infringement of a natural and constitutional right. Respondent (the State) maintains that it is justifiable as a legitimate exercise of the police power of the State . . . .

After the foregoing statement the court reviewed many authorities bearing on the right of the legislature, under its police power, to prescribe qualifications for those who desired to engage in the learned professions. In this connection

it was pointed out that the right of the legislature to prescribe certain standards for one seeking to "practice dentistry" was not open to question. Reasons were assigned for this exercise of power by the legislature, and the court then in addressing itself to the issues in the instant case, among other things, said:

> But are the reasons herein assigned applicable to a statute requiring an examination by and license from a dental board before one may "own, run, or manage" a dental office? Does the police power authorize the enactment of a statute making this requirement? . . . . It is solicitude for the physical well-being of the public, or that portion that may need dentistry work, which justifies that part of the statute providing for the examination and licensing of those who desire to "treat diseases or lesions of the human teeth or of jaws or correct malpositions thereof." To perform such work with safety and proper regard for health and comfort, the operator must possess technical knowledge and skill peculiar to the study and practice of dentistry.
>
> Can the same be said of one desiring to own, run, or manage a dental office? We think not. To own and manage property is a natural right, and one which may be restricted only for reasons of public policy,

clearly discernible. To hold this portion of the statute valid would be to make possible conditions which were never designed to exist . . .

No License Required to "Own" Dental Office.

A consideration of the province of the police power, in the light of constitutional rights, would seem to show, beyond controversy, that in the enactment of this portion of the statute the legislature transcended its authority. Should the owner or manager hire operators not legally qualified, ... they would, of course, be amenable to punishment under those provisions. But we are unable to say or perceive that the health, moral, or physical welfare of the public, or any of the personal or property rights of its individuals, are endangered by the ownership and management of a dental office so long as those employed therein to do the actual dentistry work are qualified and licensed as by law required . . . .

The Supreme Court thereupon reversed the judgment of the lower court, and gave instructions that the action be dismissed, holding, as outlined above, that one need not be a licensed dentist in order to engage in the operation or management of a dental office.

As noted heretofore the foregoing

Washington decision is perhaps the best illustration the books contain of the reasoning of the courts on the question under discussion. The case was well considered and, in the light of constitutional rights, the court's conclusions are unquestionably in accord with the weight of authority.

Addendum.

The Editor has suggested that, in the light of the foregoing Washington decision, an interesting question arises as to the responsibility should an action be brought in the event of malpractice by a qualified and licensed dentist in the employ of an owner of a dental establishment who was not a licensed practitioner. This is an engaging point which has doubtless occurred to many readers of the foregoing article, though it escaped the writer when the article was being prepared.

In this connection it would seem, on general legal principles, that the aggrieved person might have a cause of action against both the proprietor and the licensed employee, depending upon the nature and circumstances of the act

of malpractice. But, in any event, it seems clear that the proprietor would be liable, this assuming that the act of the licensed employee was committed within the scope of his employment. The question was passed upon in an interesting manner in Hannon vs. Siegel-Cooper Company, 167, N. Y. 244, under the following facts:

The Siegel-Cooper Company, a corporation engaged in conducting a department store, was alleged to have held itself out as maintaining a dental department. The plaintiff sought the services of this dental department, and thereafter brought the above styled action against Siegel-Cooper Company for malpractice. This on the ground that a servant in their employ in the said dental department carelessly, negligently, and wilfully injured the plaintiff's gums and jaws, while rendering the services requested.

The trial of the case in the lower court resulted in a judgment in favor of the plaintiff. On appeal the court seemed to think that the defendant had exceeded its power in conducting a dental establishment, but held that this

would not relieve it from liability. In this connection it was said:

> But though it was beyond the corporate powers of the defendant to engage in the business, this does not relieve it from the torts of its servants committed therein . . . .
>
> The plaintiff had a right to rely not only on the presumption that the defendant would employ a skilful dentist as its servant, but also on the fact that if that servant, whether skilful or not, was guilty of any malpractice, she had a responsible party to answer therefor in damages.

The judgment rendered against the Siegel-Cooper Company in the lower court was thereupon affirmed. Holding in effect that even though the corporation had gone beyond its corporate powers in conducting a dental establishment, yet it could not escape liability for the acts of its servants in so doing.

CHAPTER II.

Right of State to Impose Educational Qualifications Upon All Persons Seeking to Practice Dentistry Within Its Borders.

That a State has the right to prescribe reasonable qualifications for those seeking to practice dentistry within its borders is no longer an open question. And so long as statutes of this kind have not discriminated between persons seeking to engage in this profession they have been declared valid and upheld by the courts.

It follows, then, that the principal question in perhaps the majority of these cases has been whether or not the statute being construed was discriminatory. And, in this connection, the right of a State to enforce its requirements upon members of the profession from other States, who sought to practice within its borders, has been a prolific source of litigation. It has been earnestly contended in a number of these cases that the enforcement of such requirements in one

State, against duly licensed dentists of another, was in violation of constitutional rights.

But, by the great weight of authority, the courts have declined to uphold this contention, and have held that a license to practice dentistry in one State gives no vested right to practice in another. And that each State has the right to exclude from the practice those who cannot or will not meet the requirements prescribed, and the fact that the applicant is a licensed dentist of another State does not change the rule. The application of this rule is illustrated in an interesting manner in People *vs.* Griswold, 213 N. Y. 92; 106 N. E., 929, under the following circumstances:

Griswold was convicted of practicing dentistry without a license in the State of New York. He had, it appears, practiced dentistry in other States since 1881 and was licensed to practice in the States of Kansas and Utah. From his conviction in the lower court an appeal was taken in which, among other things, the section of the New York act which prescribed that applicants for examination for a dental license must have had a preliminary education equivalent to graduation from a four-year high school course, was attacked.

Griswold contended that the enforcement of this section closed the examination to him, regardless of his actual qualifications as a dentist and his many years of experience in other States. Setting up that when he began the study and practice of dentistry no such qualifications were demanded. Contending that the enforcement of this section precluded him from following a lawful calling, and was unreasonable, arbitrary and discriminatory, and in violation of rights guaranteed him under the State and Federal Constitution.

What the Court Decided.

In passing on this contention the New York Court of Appeals, after first concluding that the requirement of a preliminary education equivalent to a four-year high school course was neither arbitrary nor unreasonable, in part, said:

It may seem hard that the defendant, who has practiced dentistry for many years in other States, cannot be licensed here, or even permitted to take an examination to test his qualifications, until he first acquires the requisite preliminary and professional education; but it is difficult, if not impossible, to make a classification which will not in particular instances seem unjust. All in the same case as the defendant are treated alike. His fundamental error consists in the assump-

tion that a license to practice dentistry in one State confers the like right in all other States, whereas such license is recognized, if at all, only on principles of comity. When the appellant (Griswold) came into this State he fell into the class of those who had never been licensed, unless the Legislature saw fit to recognize the previous experience of those in the like case.

We find nothing in the statute which can fairly be said to discriminate in any way against the citizens of other States. The privileges and immunities secured to citizens of each State in the several States by the Federal Constitution are the privileges and immunities enjoyed by the citizens in the latter States, and are not the special privileges enjoyed by the citizens in their own States. . . . As a citizen of the United States, the defendant is not privileged to practice dentistry in this State without a license so to do. . . .

The defendant Griswold in the appeal also attacked the section of the New York statute as being discriminatory, in which it was provided that duly licensed dentists in the State prior to August 1, 1895, should be deemed to be licensed to practice dentistry. In disposing of this objection the court said:

The appellant has no grievance from the provision that those duly licensed and regis-

tered as dentists in this State prior to the 1st day of August, 1895, are deemed licensed to practice. It is the rule for such acts to preserve the status of those lawfully engaged in the pursuit regulated. As said in the United States Supreme Court: "The 14th Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time." Sperry & H. Co. *v.* Rhodes, 220 U. S., 502; 55 L. ed. 561; 31 Sup. Ct. Rep., 490. . . .

The foregoing decision was carefully considered and is in accord with the weight of authority. It illustrates in a clear manner the reasoning usually followed by the courts in upholding the rights of a State to enforce its regulations relative to qualifications of those seeking to practice dentistry within its jurisdiction. It also points out in a clear manner that this is a subject entirely within the province of each legislature, and the fact that an applicant is a licensed dentist in another State does not in itself confer a right of exemption from the operation of such regulations.

CHAPTER III.

Validity of Contract Forbidding Dentist's Assistant from Competing with His Employer After Termination of Employment.

To the established dentist, who seeks to employ an assistant dentist, the question of the scope of the contract of employment is deserving of careful consideration. In the first place the employing dentist will demand a competent, skilful assistant, one qualified to meet in a professional manner his friends and patrons; and in the natural order of things such an assistant, if he stays in the employment a reasonable length of time, will build up a personal following that will inure to the benefit of his employer.

It follows, that in the majority of such cases the employing dentist will desire assurance that the other will remain in the employment a reasonable length of time. And further that he will not use his position as a means of

acquiring a personal following with the idea of later on opening a competing office.

In a situation of this kind the employing dentist will in all probability seek the desired protection by the insertion of restrictive covenants in the contract of employment. In other words by a contract which by its terms forbids the assistant from competing with the other within certain time and territory after the termination of the employment.

Contracts of this kind are as a general rule valid and enforceable providing their restrictions are not unreasonable. On the other hand, if the restrictions are unreasonable such a contract may prove of no value whatever, as the courts may decline to enforce its terms. Just what will amount to a reasonable and valid contract of this kind usually depends upon the facts of each individual case, because of which the subject can hardly be covered by a hard and fast rule.

However, as a general proposition, though there are some exceptions, the courts will uphold a contract entered into by members of a learned profession in

which one becomes the assistant of the other with the understanding that he will not later become a competitor within specified territory. The territory specified, however, must be only of reasonable extent considered in the light of the employer's practice. The application of this rule of construction is illustrated in an interesting manner in Turner *v.* Abbott, 94 S. W. 64; the facts as gathered from the report being substantially as follows:

Dentist Employs Assistant Under Restrictive Contract.

Turner, an established dentist in Union City, Tenn., had need of an assistant in the conduct of his practice, and employed Abbott in such capacity. Abbott was also a dentist, but without an established practice, as he had but recently been graduated at the time of the contract.

By the terms of the contract Abbott was to receive $100 per month, and it was agreed that he would not thereafter open an office or practice dentistry in competition with Turner in Union City or the immediate vicinity. The contract was for an indefinite period, and Abbott remained in the employment seven months, after which he formed a partnership with another dentist in Union City, and prepared to practice his profession at that place.

Turner thereupon objected on the grounds that this was in violation of their contract, and the matter culminated in Turner filing the instant suit in which it was sought to restrain the other from practicing dentistry in Union City. Abbott answered and denied that he had agreed not to practice dentistry in competition to Turner when his employment had come to an end. However, after proof had been taken the chancellor decreed that the contract was as alleged by Turner, and granted an injunction against Abbott.

From this decree Abbott prosecuted an appeal to the Tennessee Supreme Court. The appeal involved, among other things, the question of whether or not the restraining terms of the contract were unlawful as being in restraint of trade, and against public policy. In passing upon this phase of the case the court announced the general rule to be as follows:

The general rule on this subject, deducible from the authorities, is that a contract in general restraint of trade—that is, not to engage in one's trade or profession at any place in the realm,—is void as being contrary to public policy; but a contract not to engage in one's business or profession at a particular place, or for a period of time, is not invalid as being contrary to public policy; but such contracts will be upheld and enforced. . . .

The court then proceeded to examine many authorities in which the foregoing rule had been applied upon the particular facts involved. Then addressing itself to the facts of the instant case it said in conclusion:

What the Court Decided.

In the present case, the defendant [Abbott] was paid for his services a salary of $100 per month, which was large compensation to a young man who had just graduated, and. under the authorities, it was perfectly competent for the parties to make the contract in question which only prohibits the future competition in Union City and vicinity. We think this contract was reasonable and not oppressive; nor was it in any way detrimental to the interests of the public. . . .

The Supreme Court thereupon affirmed the decree of the chancellor. holding, as stated above, that the contract in question was valid, and by its terms Abbott would not be allowed to practice his profession in competition with Turner, his former employer in Union City or vicinity.

The language of the court makes it clear that had the contract in question been one in general restraint it would

not have been enforced. But as the restraining terms applied only to Union City and vicinity, it was plain that this was no more than a reasonable protection to accord the plaintiff in his practice.

The case was well considered and is without doubt in accord with the weight of authority on the particular point decided. And so far as the writer has been able to discover it is one of the clearest cases the books contain in which the parties and question involved concerned the dental profession.

Truly it is an interesting decision for dentists to have in mind when entering into contracts of this character.

CHAPTER IV.

Liability of Dentist for Injury to Patient Caused by Infection After Treatment.

Of the reported cases on malpractice against dentists quite a number have been predicated on injuries suffered through infections which developed after treatment. These cases are surprisingly similar in their facts; the aggrieved patient has usually been suffering from aching teeth or gums, and applying to the dentist has had the teeth or possibly hidden roots extracted; thereafter an infection of the disturbed region developed which in many cases caused severe injuries.

All right. Now, it is not surprising that the patient should trace his trouble back step by step, and conclude that it was caused through some improper or negligent act of the dentist. The latter may have exercised every reasonable precaution, the infection may have been present before he was appealed to, yet

the circumstances may be such that the patient honestly believes that he (the dentist) was to blame.

In a situation of this kind are to be found all the ingredients of a long and bitter lawsuit; and if the patient brings his action for damages against the dentist, the question of what he must prove to recover becomes one of considerable interest to all concerned. Generally speaking, in actions of this kind the burden is on the plaintiff to prove negligence on the part of the defendant, and, further, that such negligence was the proximate cause of the injury complained of. The application of this rule is illustrated in an interesting manner in the recent case of Matuschka *vs.* Murphy *et al.*, a Wisconsin case reported in 180 N. W. 821, under the following facts:

Aching Teeth Extracted; Infection Develops.

The plaintiff, Matuschka, was suffering with toothache and called at the office of the defendant Murphy, who was practicing dentistry in Milwaukee. Murphy was not in the office, it appears,

but his employee Stromberg, another dentist, was, and the latter extracted the aching tooth for the plaintiff.

According to the report Stromberg injected a 2 per cent. novocain solution before extracting the tooth for the purpose of deadening the peripheral nerves. The tooth was then divided and taken out in two parts: a pus sac was attached to one root but none to the other. The socket was not curetted, but it was washed out with boric acid and swabbed liberally with iodin.

This extraction was performed on Saturday, and on Monday the plaintiff returned to the defendant's office, as there was much swelling. Stromberg washed out the socket, painted it with iodin, instructed the plaintiff to keep it clean and to return that afternoon. In the afternoon the same procedure was followed. Tuesday morning the plaintiff again called and the swelling was still present. Stromberg washed out the socket with boric acid, painted it with iodin, and did the same thing on Tuesday afternoon. Plaintiff returned on Wednesday, and the condition of his jaw was such that Stromberg referred him to Dr. Wenker.

Dr. Wenker upon examination discovered a serious infection. He curetted the socket from which the tooth had been drawn, made incisions through the cheek and gums, put in packing, and thereafter removed seven teeth and a portion of the jaw-bone.

Suit Brought Against Dentist.

Thereafter the instant action was brought against the dentist Murphy and his employee Stromberg for damages. This action was based on the theory that the injuries resulting from the infection were caused by the improper practice of Stromberg in extracting the tooth and in the after-treatment. The plaintiff, among other things, testified that Stromberg when extracting the tooth injected the needle into his lip, then without resterilization injected it into the gum. This was, however, denied by Stromberg.

The trial of the case, which was before a jury, resulted in a judgment in favor of the plaintiff for $10,000. Upon motion the court gave the plaintiff the option of taking $4,745, or a new trial. The plaintiff accepted the reduced judg-

ment, and the defendants prosecuted an appeal to the Supreme Court of Wisconsin. Here, in reviewing the record and in announcing the rule relative to the burden of proof which rested upon the plaintiff, it was, in part, said:

> While there is sufficient evidence in the record to sustain a finding that the defendant Stromberg did fail to exercise such reasonable care and skill as was ordinarily possessed and exercised by dentists in good standing, of the same system or school of practice at the time in question, we find a total absence of proof to support the further fact, essential to a recovery, namely, that such want of care and skill was the proximate cause of plaintiff's injuries.
>
> That plaintiff's painful experience and its lamentable results were due to an infection of the lower jaw is conceded. The question is, what caused the infection? In order to recover against the defendants, plaintiff must produce evidence from which the jury is justified in finding that it was due to the want of care and skill of the defendant Stromberg. This burden is not met by showing that it might have been the result of two or more causes, one of which was defendant's unskilful treatment. . . .

The court next directed its attention to a careful review of the expert testi-

mony bearing on the probable cause of the plaintiff's infection. This evidence did not show with any degree of certainty that the methods followed by the defendant Stromberg were the proximate cause of the plaintiff's injuries. The court quoted from the testimony of one of the expert witnesses as follows:

It is a fact that with an infectious process it is absolutely impossible for a surgeon or any one to foretell exactly how the infection will progress. The influence of the injection into the gums, as outlined, for the purpose of producing anesthesia, in my opinion did not have any influence upon the progress of the disease. The number of bacteria that might be introduced by such a method of procedure as you have outlined, that is, the penetrating of the lip with the needle, compared with those that were already present, is so small that it would be purely speculative to say that they had any influence whatever in the progress.

The court then addressing itself to the situation as a whole, in the light of all the evidence, and in announcing its conclusion said:

Dentist Held Not Liable.

Plaintiff had a chronic infection of the lower jaw, of long standing, when he went

to the defendant's office for treatment. It was impossible to foretell the future progress of that infection. The subsequent results could have followed from it without the pulling of the tooth and the subsequent treatment of the jaw according to the most exact scientific methods. They might also have followed from defendant Stromberg's negligent and improper practice and treatment. Which was the cause of the ultimate results cannot be told with any degree of certainty. While the experts differed as to the probability of the efficient cause, they conceded the possibility of any one of several causes. Where we have a result which may be attributed to one of two causes, it is not surprising that experts will differ as to the real cause. It emphasizes the fact, however, that any conclusion with reference thereto is mere conjecture and falls far short of that certainty which the law requires for the support of verdicts. Our conclusion is that the verdict of the jury, in so far as it finds that the want of care and skill on the part of Stromberg was the proximate cause of plaintiff's injuries, is unsupported by the evidence and cannot be sustained. . . .

The Supreme Court thereupon reversed the judgment rendered in the lower court, with instructions to enter a judgment dismissing the plaintiff's complaint, holding, as outlined in the opinion, that the plaintiff had failed to

prove that the acts of the defendant had been the proximate cause of his injuries, which was essential if he were to recover.

Another Case in Point.

The foregoing is an interesting and valuable case on the question under discussion and its holding is supported by much authority. And as the case turned on the element of proximate cause, a certain amount of evidence of negligence being introduced, it seems probable that the brief review of a similar case, involving negligence, may, in connection therewith, be entered into with profit. With this in view Angulo *vs.* Haller, a recent Maryland case reported in 112 Atl. 179, will serve. The facts, greatly abbreviated, were as follows:

The plaintiff had a tooth extracted and the dentist failed to remove all of the roots. Thereafter trouble developed, and after suffering for a month or more, she went to the office of another dentist, the defendant, and requested that the roots be extracted. This was on Sunday, and the defendant was not in his office but an employee, Dr. Sand-

tler, was, and he extracted the roots. He also advised the plaintiff that if she experienced any trouble to return to the office for treatment.

When the plaintiff reached her home her mouth was still bleeding. This continued until the afternoon, at which time her jaw began to swell and the pain grew worse. She did not, it seems, notify the defendant of this, but the next day called in her family physician, Dr. France.

Upon examination Dr. France discovered necrosis of the bone, and after treating her several days had her taken to a hospital. Here plaintiff underwent two operations. Upon the first Dr. France testified that, "Under general anesthetics I curetted the jaw and endeavored to relieve the condition through an opening and scraped all the necrotic or soft granular bone out." Upon the second operation two teeth were extracted and all the bone surrounding that which was involved was removed. Plaintiff was not troubled further and recovered.

Thereafter the instant suit for damages was filed against the defendant,

Dr. Angulo, on the theory that the injuries suffered were caused by the negligence and unskilfulness of his employee, Dr. Sandtler. The trial in the lower court resulted in a judgment in favor of the plaintiff. The defendant appealed, and the Court of Appeals, after first stating the rule as to the duty of the defendant to exercise reasonable care, used the following language relative to the burden of proof to the contrary resting upon the plaintiff:

> But while it is the duty of the professional man to exercise ordinary care and skill, a duty imposed upon him by law, it will be presumed, in the absence of proof to the contrary, that the operation or work done by him was carefully and skilfully done. And because of such presumption, want of skill or negligence cannot be presumed, but must be affirmatively proven. Involved in the burden placed upon the plaintiff was the necessity of showing that the professional acts of the defendant, which are alleged to have produced the injury complained of, did in fact cause such injury.

The court then proceeded to examine the evidence of record as to its proving this, and in doing this and in announc-

ing its conclusion, it was, among other things, said:

Held No Proof of Negligence.

In this case there is little or no evidence showing that fact. The injury complained of was the condition of the jaw-bone and its resulting consequences after the extraction of the tooth by Dr. Sandtler. The evidence is that, on the next day after the visit of the plaintiff to Dr. Angulo's office, Dr. France, the plaintiff's physician, found a necrotic condition of the jaw-bone, which at that time had involved the muscles and gums surrounding the teeth, or, in other words, as he stated, he found the jaw-bone rotting, and he treated it by curetting the bone and taking therefrom the rotten or decayed parts. Such an advanced necrotic condition of the jaw-bone could hardly have been the result of anything that Dr. Sandtler did, or failed to do, on the previous day. . . .

But whatever may be said as to the question, whether the injury complained of resulted from the extraction of the tooth by Dr. Sandtler, there is absolutely no evidence showing that the injury complained of resulted from the want of skill or diligence of either Dr. Sandtler or the defendant in the extraction of the roots of the tooth, or in their treatment of the plaintiff thereafter. . . .

In conclusion the Court of Appeals reversed the judgment rendered against the defendant in the lower court, without a new trial, holding, in effect, that on the evidence of record the plaintiff had failed to show that she was entitled to damages. In other words, there had been an utter failure of proof of negligence or want of skill upon the part of the defendant dentist.

It is believed the two foregoing cases fairly illustrate the reasoning of the weight of opinion in disposing of malpractice suits against dentists, based on injuries caused by infections which have developed after extractions or treatment. And their holdings may be summed up as follows:

It is the duty of the dentist to use ordinary care and skill in the performance of his work, and in the absence of proof to the contrary the law presumes such skill and care has been employed. It follows, then, that in case an infection develops thereafter to the injury of the patient, the burden is upon him (the patient) to show negligence on the part of the dentist, and further that such negligence was the cause of the in-

juries resulting from the infection. And, as illustrated in the foregoing cases, if there is a failure to show these essentials there can be no recovery that will likely be sustained by an appellate court.

CHAPTER V.

Power of State Dental Board to Determine Character of College Relative to Licensing Its Graduates.

The problem of protecting the public from unqualified persons who may seek to practice dentistry is one of great importance. And without doubt one of the most vital phases of the problem has to do with determining the standing of schools and colleges that purport to qualify students for the practice.

This power to determine the standing and character of such schools has quite generally been delegated to certain boards, and it is perhaps not surprising that the decisions of these boards have been frequently questioned by those against whom they have ruled. These actions usually consist in an application for a writ of mandamus to compel the board to issue the petitioner a license, the basis of the action being of course that in the light of the statute governing the issuance of licenses the petitioner is entitled to one.

The determination of the issues thus formed may turn on a construction of the statute under which the board acquires its powers in relation to the issuing of licenses. If then the license has been refused because of an adverse ruling of the board on the standing of the applicant's school, the question of the extent of the power of the board to decide the standing of such school is frequently raised.

And in this connection it has quite generally been held that a State dental board, in ascertaining whether or not a given school is reputable, acts judicially. If then its judgment is predicated on reasonable evidence, free from fraud or malice, it will not be disturbed by the courts. This proposition is illustrated in an interesting manner under the Illinois law in People *ex rel.* Sheppard *vs.* Illinois State Dental Examiners, 110 Ill. 180, under the following facts:

Dental Graduate Seeks to Compel Board to Issue License.

The petitioner Sheppard was a graduate of a dental college of a neighboring State and applied to the Illinois State

Dental Examiners for a license to practice dentistry within the State of Illinois. The board declined to issue the license on the ground, it seems, that the college from which the applicant was graduated was not reputable.

Upon this refusal the applicant filed the instant suit for a writ of mandamus to compel the board to issue the license. This action was based on the ground that the board had no power to determine what was, or what was not, a reputable school. The contention being that the statute itself defined what was a reputable school or college. The section of the Illinois statute relied upon by the petitioner provides, among other things, as follows:

> That it shall be unlawful for any person who is not at the time of the passage of this Act engaged in the practice of dentistry in this State, to commence such practice, unless such person shall have received a diploma from the faculty of some reputable dental college duly authorized by the laws of this State, or of some other of the United States, or by the laws of some foreign country, in which college or colleges there was, at the time of the issue of such diploma, annually

delivered a full course of lectures and instruction in dental surgery. . . .

But said board shall, at all times, issue a license to any regular graduate of any reputable dental college, without examination, upon the payment by such graduate to the said board of a fee of one dollar.

In passing upon the question thus raised, the court after stating in full the petitioner's contention, among other things said:

The word "reputable" would seem to be used here to express the meaning ordinarily attached to it. If it had been intended that a diploma from any dental college, or a diploma from any dental college "duly authorized by the laws of this State, or some other of the United States, . . . in which college . . . there was, at the time of the issue of such diploma, annually delivered a full course of lectures and instruction in dental surgery," we must presume the language would have so said. By using the word "reputable," we must presume the General Assembly meant "reputable." . . .

As a part of the current history of the times, and as an aid in arriving at the legislative intention, we know there were colleges of different kinds authorized by the laws of States in which they were located, in which there were pretended to be annually delivered full courses of lectures and instruction upon

the arts and sciences professed to be taught, that were not "reputable," because they graduated for money, frequently without any reference to scholarship. A diploma from such an institution afforded no evidence of scholarship or attainments in its holder. It was a fraud, and deserved no respect,—and it was as against such diplomas the law was intended to protect the public, and therefore required that the colleges be "reputable."

Right of Board to Determine Whether a College is Reputable or Not.

Whether a college be reputable or not, is not a legal question, but a question of fact. So, also, are the requirements in regard to the annual delivery of full courses of lectures and instruction. These questions of fact are, by the Act, submitted to the decision of the board,—not in so many words, but by the plainest and most necessary implication. Their action is to be predicated upon the existence of the requisite facts, and no other tribunal is authorized to investigate them, and of necessity, therefore, they must do so. The act of ascertaining and determining what are the facts, is in its nature judicial. It involves investigation, judgment and discretion. . . .

In conclusion the court ordered the petition dismissed, holding, as announced in the opinion, that the board

had the power to determine whether or not a given school or college was reputable, and that mandamus would not lie to compel it to decide the question in any particular way.

The foregoing Illinois decision was well reasoned, and is in accord with the weight of authority. Generally speaking, the courts have upheld the right of dental boards in passing upon the reputability of schools and colleges and, in the absence of fraud or unfairness in the conduct of its investigations, the decisions rendered will not, as a general rule, be disturbed by the courts.

However, in this connection, it is worthy of note that where authority to pass upon the standing of schools and colleges is given to a State dental board, it seems the board itself is bound to exercise this authority. At any rate it has been held that such a board has no authority to delegate its power to a foreign organization.

This point is illustrated in another Illinois case, Illinois State Board of Dental Examiners *vs.* People *ex rel.* Cooper, 123 Ill. 227. The facts in this case are somewhat long and involved

and space forbids their review in an article of this kind. However, the following will be sufficient to illustrate the court's application of the foregoing rule relative to the board's duty in refraining from attempting to delegate its powers to another organization outside the State.

In this case the petitioner, a gradnate of an Illinois dental college demanded that the board grant him a license. The license was not granted and several weeks after the petitioner had filed his application, he wrote the board inquiring why the license was not granted. In reply to this the secretary of the board wrote the petitioner, in substance, as follows:

Dear Sir,—In reply to yours of 25th, I would say that the matter of issuing a license on your diploma . . . was referred to the National Association of Dental Examiners, which will meet in August. Until their decision I cannot issue any license.

The case went up on appeal and in passing upon this attempted delegation of its power by the State dental board, as indicated in the foregoing letter, it was, in part, said:

Power Not to be Delegated to Outside Association.

It appears that the association here referred to is composed, for the most part, of men living outside of this State, and that its meeting "in August" was to take place in the State of New York.

When a regular graduate of a dental college applies to the board of examiners for a license, the only question for them to determine is whether the college at which the applicant graduated is reputable or not. The law clothes them, and no other body, with the power to decide this question. They cannot delegate their discretionary power to an organization beyond the limits of this State. By the letter of the secretary the board declined to perform the duty imposed upon it by the Illinois statute, and announced its intention of referring the question of issuing a license to a foreign association. . . .

The case was decided on the pleadings, and as from them the college from which the petitioner was a graduate was reputable, the court sustained the issuance of a writ of mandamus directing that the license be issued.

CHAPTER VI.

Judicial Construction of Contract Selling the "Good-Will" of a Dental Practice.

Where a professional practice or location is sold not infrequently the good-will thereof is of considerable value. In fact, in many cases, the buyer's main object in purchasing an established practice is to acquire this intangible asset called "good-will." It usually follows that if the buyer is to reap the benefits of the good-will purchased, it is necessary that the seller refrain from opening a competing business or office.

This then raises the question of what passes under a sale of good-will? In other words, does the sale of the good-will of a business, or practice, carry with it an obligation on the part of the seller not to re-engage in the business, or practice, to the injury of the buyer? This is a nice question and one of great importance to all concerned where an established business, or practice, is the

subject of transfer, and in this connection it may be said that, generally speaking, the sale of the good-will of an ordinary business does not imply an agreement that the seller will not open a competing business.

If the seller is to be restrained it is then necessary that the contract of sale contain covenants to this effect. There is, however, a well-defined distinction in the application of this rule where the sale is that of a professional location or practice. And it seems, by the weight of authority, that in the sale of the latter a transfer of the good-will works a reasonable restraint upon the seller, even though there are no specific covenants of this kind in the contract. This point is illustrated in a clear manner in Foss *vs.* Roby, 195 Mass. 292, under the following facts:

Good-Will of Dental Practice Sold.

Two dentists formed a partnership and as such engaged in the practice of dentistry in Boston. Thereafter the partnership was dissolved, one partner buying the interest of the other in the office furniture, dental equipment, and

good-will of the business. After this the buyer formed a partnership with another dentist and they continued the business in the same location.

The first contract of sale, it should be noted, did not contain any express covenant in respect to the seller refraining from entering into competition with the buyer, his former partner. It did, however, expressly convey the seller's interest in the good-will of the partnership practice.

About three years after this sale of his interest the seller opened an office in Boston for the purpose of practicing his profession. It appears from the report that by solicitation he obtained many of the patients of the old firm, and his practice was largely made up of this patronage.

Thereafter his former partner and the latter's then partner began the instant action in which they prayed for an injunction restraining him from thus competing with them. This action seemingly being based on the theory that as the defendant had three years previously sold his interest in the good-will of the practice he should be restrained from

entering into competition with the old firm.

The trial of the case in the lower court resulted in a decree in favor of the defendant. An appeal was prosecuted to the Massachusetts Supreme Judicial Court, where in passing upon the record it was, in part, said:

What the Court Decided.

The important questions for decision are whether the defendant is precluded by his agreement from setting up a competing business, and the measure of relief to which the plaintiffs are entitled. By the contract of sale, while the defendant explicitly conveyed his interest in the good-will, he did not expressly covenant to refrain from competition, either as to time, or territory. But the sale being of an established practice described in the instrument as "the dental business" then carried on at "Court Street, in said Boston." it was implied, even if not expressed, that thereafter the defendant would so practice his profession as not to injure and perhaps destroy the business he had sold. . . . In a mercantile partnership the sale of the good-will conveys an interest in a commercial business, the trade of which may be largely, if not wholly, dependent upon locality, and the right which the vendee acquires under such a purchase is the chance of being able to retain the

trade connected with the business where it has been conducted. . . . But in a partnership for the practice of dentistry, the personal qualities of integrity, professional skill and ability attach to and follow the person, not the place. . . .

The object to be obtained was the protection of the vendee, and the agreement is to be construed as if the defendant had expressly covenanted to render the old practice secure by not competing himself under conditions by which it might either be impaired or destroyed. If this were permitted, then, while retaining the consideration, the defendant might also deprive the plaintiffs of the benefit of their purchase by regaining the customers. Neither is the agreement, under this construction, invalid because unlimited in time, for the consideration paid must be treated as having been accepted by the defendant as a full equivalent for a release of his right to compete within a restricted territory, if by such competition the good-will sold was or might be rendered insecure. . . .

After citing authorities in support of the foregoing statement, and a review of the methods employed by the defendant in building up his business to the injury of the plaintiffs, the court addressed itself to the measure of relief to which the plaintiffs were entitled. In this connection it was said:

The business of the old firm was conducted in Boston, which is the only locality referred to in the agreement, although the practice was not wholly derived from the place where patients were treated, but had been acquired from other cities and towns throughout the eastern and interior sections of the State. But until it becomes affirmatively manifest that the plaintiffs are likely to derive some substantial advantage or protection, the vicinage ought not to be extended by implication to include the entire area within which former patients resided. ' . . . They are amply protected by an injunction enjoining the defendant from practicing his profession within the limits of the city. . . .

In conclusion the court reversed the decree rendered above and awarded the plaintiffs an injunction as outlined below. In addition it was held that upon request of the plaintiffs they might be given such money damages as they had sustained by reason of the defendant practicing his profession in competition with them.

The foregoing decision is perhaps the clearest and best reasoned the books contain on the precise point under discussion. The rule announced is in accord with the weight of authority which holds that in the sale of the good-will of a pro-

fessional practice, or location, there is an implied covenant that the seller will not compete to the injury of the buyer.

However, it may be noted that this question is still an open one in many States; in other words the particular point has not been passed upon. And while it is reasonable to suppose that a given State will follow the rule laid down in the Massachusetts case above, yet this cannot be stated as a positive fact. If then a contract of this kind is entered into in a State where the point has not been passed upon, it would seem but prudent for all concerned to have a reasonable restraining covenant inserted into the contract.

CHAPTER VII.

On Collecting for Dental Services Rendered to Minors.

In performing dental work for a minor the dentist who is prudent will give some thought to his rights in the matter of enforcing payment for the services rendered; this assuming that the services are other than for cash, and amount to a worthwhile sum. And in this connection it may be stated broadly that the dentist may look to two sources for payment. *i. e.,* either the minor or his parents. But now comes the difficulty.

If it is sought to enforce payment from the minor the burden is on the dentist to show the services rendered were necessaries. This will usually be a question of fact, and whether or not services rendered were necessaries will depend upon the station in life of the minor, and all the circumstances in the case. The subject cannot be covered by a general rule, so much depends upon the particular facts

of each individual case, and may best be illustrated by the review of a leading case.

In this connection Strong *vs.* Foote, 42 Conn. 203, is of interest; for while it is by no means a recent case, yet owing to the facts involved, and the clear application of the law to them, it becomes a case of great value. The circumstances leading up to the action were substantially as follows:

The defendant was a minor fifteen years of age and the owner of an estate valued at $60,000. Plaintiff was a dentist and performed dental work for the defendant on one occasion to the value of $66.00, later other dental services were rendered of the value of $4.00. The work was charged to the defendant and the latter's guardian paid the bills without question.

About two years later the defendant accompanied by friends went to the plaintiff's office, had his teeth examined, and they were found to be in bad condition. The plaintiff at the defendant's request proceeded to clean and fill them. This work was of the value of $93.00. The guardian declined to pay the bill,

and the foregoing suit was filed by the plaintiff in an effort to collect.

Upon the trial of the case in the lower court the plaintiff was awarded a judgment. The defendant appealed, and in announcing the rule as to what constituted necessaries in relation to the needs of minors it was said:

In suits against minors, instituted by persons who have rendered services or supplied articles to them, the term "necessaries" is not invariably used in its strictest sense, nor is it limited to that which is requisite to sustain life, but includes whatever is proper and suitable in the case of each individual, having reference to his circumstances and condition in life.

The court then directed its attention to the particular facts of the instant case and in determining whether or not the services rendered amounted to necessaries it was said:

The defendant applied to the plaintiff for relief from pain and the prevention of its recurrence; he, finding the cause in the defendant's decaying and neglected teeth, immediately began the work of relief and repair . . . It was necessary for the preservation of the teeth and the charge therefor is reasonable in amount. In view of the circumstances of

this defendant, we have no hesitation in saying that the services are within the legal limitations of the word "necessaries." . . .

On the question as to whether or not the plaintiff had acted with due care in performing the services without inquiry of, or notice to, the guardian the court, in part, said:

Again, friends of the defendant . . . had twice previously taken him to the plaintiff for dental services, for which bills had been made out in his name, and had been paid; his guardian furnishing the money without warning or objection to plaintiff. These acts on the part of the defendant and his guardian rendered it unnecessary that the plaintiff should have instituted an inquiry as to a guardianship over the defendant, before performing these last services. . . .

The judgment in favor of the plaintiff dentist rendered in the lower court was thereupon affirmed.

Holding the Parent Liable.

On the other hand, if the dentist attempts to hold a parent liable for services rendered a minor he must, generally speaking, show that the parent authorized the work, ratified same after completion, or that the services were necessary

for the health or comfort of the minor, and that the parent negligently failed to have the work done. This is obviously casting quite a burden upon the dentist, but unless he can bring his case within one or more of the foregoing requirements he cannot hold the parent liable.

This phase of the question is illustrated in a number of cases, among them being Stimpson *vs.* Hunter, a Massachusetts case, reported in 125 N. E. 155, 7 A. L. R. 1067. The facts involved being in the main as follows:

A minor son of the defendant, between seventeen and eighteen years of age, applied to the plaintiff for dental services. The plaintiff rendered the services and charged them to the son. It seems that the plaintiff at this time did not know the father's name, neither did he make any inquiry relative to the bill being paid by the father.

Thereafter the plaintiff sent a bill to the son; this was not answered and after the father's name had been ascertained a bill made to the son was sent to him. This was returned by the father, later the defendant, with the notation, "You won't get any money on this bill for quite

some time yet," and signed by the father.

The bill was not paid and the plaintiff brought the foregoing action against the father. The trial in the lower court resulted in a judgment in favor of the plaintiff. The defendant prosecuted an appeal, and in passing upon the record the higher court, among other things, said:

> It did not appear that the defendant was apprized that the work was contemplated or knew of it while in progress; it was not performed on his credit; and there was no special exigency rendering the interference of a third party reasonable and proper. On the facts stated it could not be found properly that the defendant authorized the work. . . .
>
> The sending of the bill to the father was not notice that a claim had been or was then made against him. Therefore, his answer was neither an admission of liability nor evidence of ratification. . . .

In conclusion the court sustained the defendant's exceptions, holding in effect that on the record the plaintiff was not entitled to recover, as he had not shown circumstances or facts that could be relied upon to charge the father with responsibility for the work done.

Other Side of Question.

The other side of the question, *i. e.*, when the parent will or may be held liable, is illustrated in an interesting manner in Ketchen *vs.* Marsland, 42 N. Y. S. 6, under the following state of facts:

The defendant's infant daughter was residing temporarily with a Mrs. Beecher. The child's teeth needed attention and it appears Mrs. Beecher took her to the office of the plaintiff where the required dental services were rendered.

Thereafter the plaintiff sent a bill to the defendant and received no answer. Then from time to time, covering a period of about three years, the plaintiff continued to communicate with the defendant, but it seems was unable to get any response. The matter culminated in the filing of the foregoing suit.

The plaintiff was given a judgment in the lower court and the defendant prosecuted an appeal to the higher court. Here in passing upon the record the court, in part, said:

The plaintiff sent a bill to the defendant for these services, and received no answer, either in approval or dissent; and, during the ensuing three years, or more, up to the time of the commencement of this action, several communications of his to the defendant, with regard to his claim, met with no better response. Was not a ratification to be inferred from such silence? Clearly, the answer must be in the affirmative.

The court next directed its attention to a review of the circumstances under which the services had been rendered in relation to charging the defendant. In this connection it was, among other things, said:

Mrs. Beecher was not a mere intermeddler, without shadow of right to bind the defendant, such as might have justified his ignoring a claim based upon her assumed agency in his behalf. She had been accorded the care and custody of his child, with certain implied duties to perform for the infant's well-being; and the procuring of certain necessaries, should circumstances require, was one of these duties. Granted that the services performed by the plaintiff were not such as the defendant became liable for, in the first instance, through the agent's act merely, yet this was because the agent, being authorized to contract for some services, was not authorized as to these.

She exceeded her actual powers, while clothed with some, and but for the principal's subsequent assent, expressed or implied, he would not have been bound. Under the circumstances of the case, the defendant's subsequent assent appeared from his failure to dissent during this extensive period succeeding his knowledge of the facts. He was bound to disavow Mrs. Beecher's act within a reasonable time after notice. . . .

The court concluded by affirming the judgment rendered for the plaintiff in the lower court, holding, as appears in the opinion, that the defendant's silence amounted to a ratification of his agent's acts that bound him.

The foregoing decisions illustrate in a fair manner the reasoning of the courts in determining the rights of a dentist to enforce payment for services rendered to a minor. Taken together they form a neat cross section of this branch of the law, and illustrate in a striking manner the difficulties incident to the enforcement of claims of this kind.

And while under certain circumstances payment for dental services to minors may be enforced, the subject is one of some difficulty. Each case must necessarily be decided in the light of the facts

involved, which precludes the statement of a general rule that would control in all cases. For these reasons it would seem but prudent, before work of any considerable value of this kind is performed, that inquiry be made relative to either authorization or security of the account by some responsible person.

CHAPTER VIII.

On Collecting for Dental Services Rendered to Married Women.

Not infrequently a dentist's clientele may be composed in a considerable measure of married women, and so long as the services rendered to them are for cash their marital status may be of little concern to the dentist. If, however, such services are charged, the question of the legal right of the dentist to enforce payment, and the further question of just who is liable, as between the woman and her husband, may become one of considerable interest.

The question is one of some difficulty and may perhaps be best approached under the following heads: First, when will the dentist be able to enforce payment from the estate of a married woman for services rendered? Second, when will the dentist be forced to rely upon the resources of the husband if suit is filed? Embraced in the second head is the further point of when the husband

will be liable for such services, which will be touched upon in its order.

Now, on the first point, generally speaking and without regard for particular cases and statutes, it may be said, that to hold a married woman liable for dental services rendered it must appear affirmatively that it was her intention to bind her estate. The presumption is against this, and her mere promise to pay will not be sufficient to make her liable unless it appear that it was her intention to assume the liability. In other words, to bind her estate there must be an agreement to that effect, otherwise the dentist must look to her husband for payment, for in the absence of such an agreement she will be presumed to have contracted for him. This phase of the subject may be illustrated by a brief review of Clark *vs.* Tenneson, 146 Wis. 65. The facts out of which the case arose were in the main as follows:

Dental Services Rendered to Married Woman and Charged to Her Account.

The plaintiff was a duly licensed dentist engaged in the practice of his pro-

fession, and was employed by the defendant, a married woman, to make a set of artificial teeth for her use. At the time this contract was entered into the plaintiff knew the defendant was a married woman, and it seems she had always previously paid him personally for dental work he had done for herself and children.

Upon the completion of the work the plaintiff charged same to the account of the defendant. The defendant declined to pay, and the matter thereafter culminated in the instant suit, in which the plaintiff sought to collect, against her personally.

The defendant contested the action on the grounds that the claim represented necessaries that her husband was bound to supply and therefore that he was liable and not she. In reply to this the plaintiff set up that it was understood from the beginning that the transaction was an individual and personal sale to the defendant, and that she assumed to pay for same. The cause reached the Wisconsin Supreme Court on appeal and in passing upon the question as to whether or not the teeth were "necessaries" it was, in part, said:

The only question in dispute is whether the defendant's husband is liable for these sets of artificial teeth, as articles of such necessity that he, as husband, is obligated to pay for them. . . . It is a matter of common knowledge that artificial teeth are most useful and necessary articles for the promotion of personal comfort and health, and that their use in this country has attained practical universality. We consider that such teeth come within the class of articles constituting "necessaries," which a husband may be bound to furnish his wife. . . .

After the foregoing statement of its conclusion on this phase of the case, the court addressed its attention to the contention of the plaintiff, that the transaction between the plaintiff and the defendant was one that would personally bind the latter. In reviewing the evidence on this point it was said:

Wife Represented Husband in Contracting for Services.

True, the plaintiff had no personal dealings with the defendant's husband. But this is not necessary, if the articles were purchased under circumstances indicating that they were supplied her in the usual manner, as necessaries for which a husband is liable as such. The question is, did the wife negotiate the purchase under circumstances indicating that she was authorized to do so?

It appears with sufficient certainty that the defendant attended to the dental affairs of herself and of other members of the family, including the payment of such bills. There is nothing in the record to show that she paid such bills out of her separate funds or estate. Presumably, then, she made the payments for the husband and father. This is sufficient to apprize the plaintiff of this fact, and he must be deemed to have dealt with her upon this basis, which showed her relation to the transaction. . . . Under the circumstances, we consider that it was established that the defendant was acting under the authority of her husband, and the court properly held that it was not shown that the defendant was individually liable upon the claim presented against her.

In conclusion the Supreme Court affirmed the judgment of the lower court in favor of the defendant, holding, as outlined in the opinion, that the plaintiff had failed to show that the contract entered into was one that would render the defendant personally liable.

The foregoing case is one of the clearest the writer has discovered upon this phase of the subject under discussion. It illustrates in a striking manner the importance to the dentist of a clear understanding of liability where services

are rendered to a married woman, if the dentist proposes to rely upon the woman for payment. For, by the weight of authority, he will not be permitted to recover from a married woman unless he can establish such a contract.

Rights of Dentist to Collect from Husband.

This then brings us to the second phase of the subject, *i. e.*, when and under what circumstances will the dentist be entitled to hold a husband liable for dental services rendered to the wife? Here again we are on somewhat difficult ground, and as the books contain but few cases involving the precise point, it is necessary to refer to general legal rules governing the liability of a husband for necessaries furnished his wife.

In this connection it may be stated broadly, that a wife, merely by virtue of the marital relation, as a matter of law, does not acquire the right to pledge her husband's credit. Before she may do this, agency, expressed or implied, must be shown.

As a general rule for example, a husband will not be liable, even for neces-

saries furnished his wife, where she has left him without cause; or, where she has agreed to accept a certain sum from him for her maintenance and he has paid as agreed.

On the other hand, if the husband expressly authorized the wife to contract for dental services, or if he pays such bills from time to time, or in other ways acts or talks in such a manner as to show an acquiescence in the incurring of such obligations, he may not be permitted to deny the right of the dentist to recover. And further, if he fails to provide for his wife he will usually be liable for necessaries she has purchased, providing they are living together, or even though they are living apart if the separation was due to his fault and she was free from blame.

It is plain from the foregoing that if the dentist is to render services to a married woman, on her husband's credit, he owes it to himself to have some knowledge of their domestic arrangements. If he goes ahead and does the work merely on the wife's word that the claim will be paid, he may incur some risks if it becomes necessary to enforce payment

from the husband. For the latter may have a good defense to such an action that the dentist failed to discover before it was too late. This is of course assuming that the husband has made no representations relative to the work, nor has acted in such a manner previously as to lead the dentist to suppose that he approved the agreement entered into by the wife.

On the other hand, if the services rendered are necessaries, in the light of the husband's station in life, and he has by word or action led the dentist to believe the wife had authority to contract for the services, the dentist will as a general rule be entitled to recover.

Just what actions, or representations, may be sufficient to charge the husband in situations of this kind may be illustrated by the holding in Gilman *vs.* Andrus, 28 Vt. 241. The material facts out of which the action arose were as follows:

Dental Services Rendered to Wife and Charged to Husband.

The plaintiff dentist, it seems, had for some time previous to this action ren-

dered dental services to the defendant's wife. These services had been paid for without objection by the defendant, and thereafter he had a conversation with the plaintiff relative to the making of a plate of mineral teeth for his wife. At this time the defendant said he would have the work done as soon as he was able.

Thereafter, it seems, the defendant's wife contracted with the plaintiff for the plate; it was made, delivered, and retained by the wife, but the defendant declined to pay for it. The instant action followed in which the plaintiff sought to recover the amount claimed to be due. In reviewing the evidence and in passing upon the liability of the husband on the facts disclosed the court, in part, said:

> The plaintiff, from previous dealings which he had had with the defendant, had reason to believe that the wife was authorized to contract for the plate. . . . The plaintiff had been previously, and shortly before the plate was contracted for, employed by the defendant's wife as a dentist, for which services the defendant does not dispute his liability. The defendant also had a previous conversation with the plaintiff in relation to furnishing the plate, in which the defendant told

him he would have the work done as soon as he was able. Those circumstances, in connection with the fact that he permitted his wife to retain the plate . . . are sufficient to show her authority to make the purchase, and the defendant's liability. . . .

In conclusion the judgment of the lower court in favor of the plaintiff was affirmed.

Conclusion.

It is believed the two foregoing cases when taken together constitute a fair presentation of the case law of the subject under consideration. As noted in the beginning, the subject is one of some difficulty, and each case of this kind must necessarily be decided in the light of the facts and circumstances involved, and perhaps in the light of the statutes of the State in which it arises. However, it would seem, generally speaking and without regard for particular facts and statutory enactments, the holdings reviewed may be briefly summarized as follows:

The right of a dentist to enforce payment against a married woman personally for services rendered, will depend

upon whether or not the services were contracted for by her, with the express intent of binding her estate. If so, the dentist may enforce payment from her. If, on the other hand, the married woman merely promised to pay, or merely ordered the work or services, the presumption is that she was acting for her husband, and whatever right of recovery the dentist may have will needs be directed against the latter.

The right then of the dentist to recover against the husband will depend upon the circumstances of the case, as has been previously outlined. But in any event before the husband can be forced to pay, either ratification after the act, or agency, expressed or implied at the time the services were contracted for, must generally speaking be shown.

CHAPTER IX.

Dental Instruments as "Tools" Within Meaning of Statutes Exempting Such from Execution.

THE exemption statutes of the different States vary so widely in their terms that each case arising under them must necessarily be decided in the light of the statute where the action arises. For this reason it is obvious that the statement of a general rule that would govern exemptions in all cases is hardly possible.

However, in this connection, it may be stated that generally speaking the purpose of exemption statutes is to prevent a creditor from taking all an unfortunate debtor may have. In other words, to save to the debtor his actual means of livelihood so that he may continue to be self-supporting even though financial reverses overtake him.

With this in mind statutes of this kind frequently stipulate that the debtor shall be permitted an exemption on the "tools," "instruments," "implements," etc., that he uses in his customary employment. In some of the statutes

articles of this kind are exempt up to a certain value; in others no value is set, but regardless of this, the question in perhaps the majority of exemption cases is whether or not the articles sought to be retained by the debtor, come within the meaning of the statute.

It follows that in deciding cases of this kind, the courts have been called upon to apply the terms of the statutes to particular facts arising in, or out of, many different trades and professions. In this connection dental equipment has been considered in a number of cases, and it has been generally held, that the tools used by a dentist, in the practice of his profession, are exempt from execution under provisions exempting "mechanical tools," used by the debtor in his principal business. This reasoning of the courts in construing statutes of this kind may be illustrated by a brief review of Maxon *vs.* Perrott, 17 Mich. 332, which arose under the following facts:

Dental Instruments and Equipment Levied Upon.

An action in replevin was brought in which it was sought to obtain, among

other things, a case of dental instruments. One side claimed these instruments were exempt from execution under the provisions of an exemption statute which provided against the levy and sale under execution of "the tools, implements, materials, stock, apparatus, . . . or other things to enable any person to carry on the profession, trade, occupation or business, in which he is wholly or principally engaged, not exceeding in value $250."

The other side took the position that the dental instruments were not exempt by virtue of the following amendment to the foregoing statute, because the judgment under which the instruments had been taken was rendered for the purchase price of the instruments. This amendment provided as follows: "The property exempted in the subdivision of which this Act is amendatory, excepting mechanical tools and implements of husbandry, shall not be exempt from any execution issued upon a judgment rendered for the purchase money for the same property."

This raised the question of whether or not the case of dental instruments could

be considered "mechanical tools" within the meaning of the foregoing amendment. In passing upon this the court after first stating the facts and quoting from the statutes, in part, said:

Dental Instruments Held Exempt.

The question which this case presents, is whether the case of dental instruments is covered by the term "mechanical tools" or not; it being clear that, if not, these instruments were subject to the levy of the execution in question. . . .

I do not deem it necessary, however, to enter upon a critical examination of the words employed in the statute, as my brethren are all of the opinion that under any construction which could be reasonably given to the word "mechanical," as here used, the tools of a dentist must be included. A dentist, in one sense, is a professional man, but in another sense his calling is mainly mechanical, and the tools which he employs are used in mechanical operations. Indeed, dentistry was formerly purely mechanical, and instruction in it scarcely went beyond manual dexterity in the use of tools, and a knowledge of the human system generally, and of the diseases which might affect the teeth and render an operation important, was by no means considered necessary. Of late, however, as the physiology of the human system has become

better understood, and the relation of its various parts and their mutual dependence are more clearly recognized, dentistry has made great progress as a science, and its practitioners claim, with much justice, to be classed among the learned professions.

It is, nevertheless, true that the operations of the dentist are still for the most part mechanical, and, so far as tools are employed, they are purely so; and we could not exclude these tools from the exemption which the statute makes, without confirming the construction of the statute within limits not justified by the words employed. . . .

In conclusion the court held, as outlined in the opinion, that the dental instruments were within the statute and therefore exempt from execution.

Holdings in Other Cases.

The foregoing decision is perhaps the best reasoned the books contain on the point under discussion, and it is in accord with such other authority as the writer has been able to discover. For in Duperron *vs.* Communy, 6 La. Ann. 789 it was also held that the surgical instruments of a dentist were exempt from execution under the Louisiana statute.

However, in Burt *vs.* Stocks Coal Co., 119 Ga. 629, 46 S. E. 828, a dentist's

chair was held not exempt, under the Georgia statute, as a "common tool of trade." In construing this phrase of the statute, in relation to its application to a dentist's chair the court, among other things, said. "The phrase 'common tools of trade,' therein, has uniformly been construed to refer not to tools in common use by the debtor, regardless of their value, but to those simple and inexpensive appliances used in his trade."

It is obvious from the foregoing that whether or not the instruments, equipment, and appliances of a dentist will be exempt from execution depends upon the wording of the statute in the State where the action arises. However, it would seem that, under the provisions of exemption statutes that exempt "tools of the debtor's trade or profession," the instruments of a dentist would be exempt providing they did not fall outside of the statute because of value, where the latter is stipulated.

CHAPTER X.

Judicial Construction of Contracts in Restraint of Trade Made in Connection with the Sale of a Dental Office.

In perhaps the majority of cases where a dental practice is sold, the question of how far the contract of sale should go, in restraining the seller from competing with the buyer, is one of great importance. The average buyer of such a practice as a matter of course desires to be protected in his purchase. In other words he wants some assurance that the seller will not, perhaps six months thereafter, again open an office and attempt to attract the patrons of his old office.

On the other hand, the seller, owing to the uncertainties of the future, should not in justice to himself handicap his future movements in an unreasonable manner. It follows, the question of what will amount to a "reasonable" restriction, and one that will be enforced by the courts, becomes in such situations of

vital interest to both the buyer and the seller; and it may be stated at the outset that unless such a contract is drawn with some care it may prove a grievous disappointment to one or the other of the parties.

In the first place, generally speaking, the courts will not enforce a contract in general restraint of trade. That is, a contract that restrains one without limit as to time or territory. This for the reason that such contracts are usually held to be against public policy. On the other hand, the courts will usually enforce a contract in partial restraint of trade; at least to the extent that the buyer actually requires to protect himself in the purchase he has made. The vital question then in drawing such contracts is, what terms will be reasonable in the light of the practice sold?

In arriving at this, the location, whether it be in a village, or in the heart of a great city, should of course be taken into consideration along with all other facts and circumstances. And certainly care should be used in drawing the terms, in particular those relating to the territorial limitations, for if they are am-

biguous, or uncertain, they may easily lead to after dispute. And as the reasonableness of such contracts is usually one of fact, it would seem the safest criterions of their sufficiency would be found in the decisions where the question has been judicially passed upon.

From this viewpoint a brief review of some of the decided cases on the point may prove interesting and perhaps be of more value, in illustrating how the courts construe contracts of this kind, than any amount of general theorizing. With this in mind Cook *vs.* Johnson, 47 Conn. 175, is worthy of consideration; for while it is not a recent case on the point, yet, owing to the clear statement of the rules of construction laid down by the court, it becomes a decision of great value. The facts involved were briefly stated, as follows:

Dental Practice Sold—Seller Restrained.

The defendant Johnson sold his dental practice to Cook and executed the following agreement in witness of the sale:

I this day sell and convey to Frank F. Cook all the furniture and fixtures in the rooms over Dr. Beckwith's drug store; also

my good-will; and do agree and bind myself not to practice dentistry within a radius of ten miles of said Litchfield, and for the consideration above named have this day received one hundred dollars from Frank F. Cook's hand.

Thereafter, it seems, Johnson proceeded to practice dentistry in Litchfield in violation of his agreement, and Cook brought the instant suit in an effort to restrain him. The defendant Johnson, it appears, defended the action on the ground that the contract was too uncertain and indefinite as to both territory and time to be enforced.

The contention being that the description as to the territory covered, namely, "within a radius of ten miles of said Litchfield," was uncertain because it did not specify any given point from which to compute the radius. The other objection was based on the fact that there was no time of duration stated, which the defendant insisted made the contract unenforceable.

The court in passing upon the questions raised quoted the contract, then in announcing the rule relative to the requisites of such contracts, in part said:

As this belongs to the class of contracts in restraint of trade, three requisites are essential to its validity. 1st. It must be partial, or restricted in its operation in respect either to time or place. 2d. It must be on some good consideration. 3d. It must be reasonable, that is, it should afford only a fair protection to the interests of the party in whose favor it is made, and must not be so large in its operation as to interfere with the interests of the public.

After this statement of the general rule of requisites, the court noted the contention of the defendant, as heretofore outlined, and in addressing itself to the first, *i. e.*, that the contract failed to state a definite point from which to compute the ten-mile radius, it was, among other things, said:

Territorial Description Construed.

But in making such a contract the parties would naturally take their stand at the place where the business to be sold had been carried on, and would fix the utmost limits of the territory at equal distance from that point in every direction, and as far at least as they supposed the good-will might attract customers. Now the contract is dated at "Litchfield," where the postoffice of that name was located, and the ten miles are to be computed

from "said Litchfield," referring to the place where it was dated. It is also to be remarked that the precise point in the village of Litchfield where the business referred to had been carried on by the respondent is mentioned, namely, "in the rooms over Dr. Beckwith's drug store."

Now if we put ourselves in the position of the parties it would seem that the language which they used is capable of very easy and definite application, and thus construed the contract means ten miles in every direction from the center of the village of Litchfield.

The court next addressed its attention to the second contention of the defendant, *i. e.*, that the time the contract was to run was too indefinite. In disposing of this point it was said:

> The contract is silent in respect to the time of its duration. But there is a well-settled distinction between a general restriction as to *place* and a general restriction as to *time*. The mere fact that the duration of the restriction as to time is indefinite or perpetual will not of itself avoid the contract if it is limited as to place, and is reasonable and proper in all other respects.

The court in conclusion affirmed a decree rendered in the lower court in favor of the plaintiff, holding that the contract was valid and enforceable.

At this point it may be noted that there are cases involving the sale of physicians' practices in which it has been held that such a contract unlimited as to time is invalid. However, it seems the foregoing Connecticut case is in accord with the weight of authority, which holds that a contract unlimited as to time is valid, providing there is a reasonable territorial limitation.

Another Case in Point.

Another interesting case involving a contract in restraint of trade, ancillary to the sale of a dental practice, which is illustrative of what has been held to be a reasonable restraint both as to time and territory, is that of Niles *vs.* Fenn, 33 N. Y. S. 857. The action was predicated on the following facts:

The defendant had for a period of ten or twelve years practiced dentistry at 172 East One Hundred and Sixteenth street in New York City. He sold his location and good-will to the plaintiff for the sum of $1,500, and agreed not to re-engage in the practice of dentistry for a period of four years, "within the

territory bounded by the Harlem river on the north, Seventieth street on the south, East river on the east, and the North river on the west."

Before the expiration of the time limit on this contract, it appears, the defendant re-entered the practice of dentistry within the territory defined. The plaintiff thereupon brought this action in which he prayed for an injunction that would prevent the defendant from continuing in such practice. In sustaining this contract the court, among other things, said:

> The object of this agreement was to protect the good-will, which formed the main inducement to the sale, and for which the plaintiff parted with almost all the money he paid. Although the business sold was a professional one; the law recognizes the fact that it has a good-will which may be sold as an incident of the business. . . . It is a species of property depending upon circumstances for its value. It is in some instances more valuable than the second-hand chattels that go with it, and often the inducing cause of a purchase. It may be precarious; need attention: and at times protection. Part of the custom may by the change drift away, but the vendor must not create the current that carries it. . . .

The court then, after a review of the facts and evidence which convinced it that there had been a clear violation of the agreement by the defendant, concluded by saying:

> The case presented calls for equitable interference. The covenant must be preserved and enforced, and to that end the plaintiff is granted the injunctive relief claimed.

The two foregoing cases are among the clearest the writer has found in which the question under consideration has been passed upon, in respect to the sale of a dental practice. These holdings when taken with kindred cases involving the sale of other professional practices, such as medical, legal, etc., may, it seems, be fairly summarized as follows:

Summary.

A contract in restraint of trade, ancillary to the sale of a dental practice, based on an adequate consideration, will be enforced providing its terms are only in partial restraint and afford no more than a fair protection to the rights of the purchaser, without prejudice to the public welfare. And by the weight

of authority such a contract will not be invalid because no definite time is stated, providing the territorial restriction is reasonable.

However, as noted heretofore, the courts are not precisely in accord on the latter point, some holding a limitation as to time to be necessary. In view of the latter some care should be exercised on this point. If the law of the State in which it is drawn demands a time limitation it should of course be inserted. And even in States where it is an open question it would seem but prudent to restrict the time, and thus forestall any possible future difficulty on that score, especially so if this can be done without detracting from the rights of the purchaser.

It is of course obvious that the contract should be drawn in plain unambiguous terms; particularly as to the territory covered. The Connecticut case that has been examined illustrates the importance of this, and how if anything is left to conjecture, it may, in the future, become a cause of dispute. And above all a reading of the cases of this class is impressive of the importance to the purchaser of being reasonable in

his demands—the validity of any such a contract depends upon this—and not try to cover too much ground, for if he does he may find that his contract is indeed but a "scrap of paper," furnishing him no protection whatever.

CHAPTER XI.

Judicial Construction of Statutes Providing for the Revocation of Dental Licenses for Cause.

Without doubt the enforcement of statutes providing for the revocation of dental licenses for cause has redounded to the benefit of both the general public and the dental profession, and while the right of a legislature to enact statutes of this kind has been quite generally upheld, the courts are not precisely in accord on the question of how the causes for revocation should be defined.

For example: In some States, and these States are in the majority, acts of this kind have been upheld where the grounds for revocation have been stated in general terms: as, "for fraudulent or misleading statements as to skill," or, "for dishonorable conduct," etc.; the courts interpreting these general terms according to their accepted meaning, and leaving the question as to whether they have been violated or not entirely with

the boards that have been given power to try such cases, and in jurisdictions where this is the rule the judgments of such boards will not, as a general rule, be disturbed in the absence of fraud or bad faith.

On the other hand, in some States the courts have declined to uphold such statutes where the causes for revocation were described in general terms, as illustrated in the foregoing paragraph. These courts have taken the position that, before such a serious penalty should be enforced, the statute should clearly inform those amenable just what acts would amount to cause for the revocation of their licenses.

The reasoning of the courts in these respective lines of decisions may perhaps be best illustrated by the brief review of a case from each class, and as an example of the holdings in which it is held sufficient to state causes for revocation in general terms, Richardson *vs.* Simpson, *et al.*, State Board of Dental Examiners, 88 Kansas 684, will serve. The facts and circumstances leading up to the action were in the main as follows:

The Kansas statute upon which the action was predicated provided among other things that the State Board of Dental Examiners might revoke the license of dentists, "who have, by false or fraudulent representations, obtained, or sought to obtain, money or any other thing of value, or have practiced under names other than their own, or for any other dishonorable conduct."

Plaintiff's License is Revoked.

Richardson, the plaintiff, was a dentist engaged in the practice of his profession. A complaint against him was made before the State board of dental examiners predicated on an alleged violation of the provisions of the law quoted from in the preceding paragraph. This complaint alleged that he had been guilty of obtaining money by false pretenses and of dishonorable conduct. Under this it was specified that he had performed services for a customer under promise to make needed repairs without charge, and that after receiving payment in full he had refused to make repairs that became necessary by reason of defective work.

The board investigated the matter and after hearing the evidence issued an order revoking Richardson's license. The latter thereupon brought the instant action in the District Court to enjoin the board from enforcing its order, and being successful obtained a permanent injunction. The board then prosecuted an appeal to the Kansas Supreme Court.

The two principal contentions of the plaintiff seem to have been: First, that the conduct complained of did not amount to obtaining money under false pretenses. Second, that the provision of the statute providing for the revocation of a dentist's license for "dishonorable conduct" was void for uncertainty. In passing upon the first of these contentions, the court, after stating that the decision of the board was final on questions of fact relative to whether a license should be revoked or not, so long as the board acted in good faith, in part, said:

> Whatever should be the rule in a criminal prosecution, the making of a promise, without any intention of performing it, should be regarded as a false pretense, within the meaning of the statute here involved. Of course,

the mere failure of Richardson to keep a business agreement would not be a ground for revoking his license; but the evidence warranted the belief, upon which the board obviously proceeded, that he knew the work was defective when he collected pay for it, and that he had no intention of making the repairs.

The court next directed its attention to the plaintiff's second contention, *i.e.*, that the term "dishonorable conduct" was too vague to permit of its enforcement as a ground for the revocation of his license. In passing upon this phase of the case it was, among other things, said:

The plaintiff contends that the portion of the statute warranting the revocation of a dentist's license for "dishonorable conduct" is unconstitutional and void, because the phrase is too indefinite to be made the basis for such action. Several courts have held in accordance with that contention, the argument being that a course regarded by one person as dishonorable, may not seem so to another; and there is no fixed standard by which the disagreement can be settled. . . .

The court then, after reviewing and citing a number of authorities on the question, stated its reasons for declining to approve of the plaintiff's contention in the following language:

General Terms in Statute Held Sufficient.

We think it is going entirely too far to say that such a provision is a nullity. Before a license to practice dentistry is issued, the applicant is required to furnish proof that he is "of good moral character." . . . The phrase is general; but no great practical difficulty attends its application. The courts which make a distinction between general language used in defining the conditions upon which one may be originally permitted to practice, and similar language used in stating the grounds upon which the permission may be withdrawn, proceed upon the theory, not accepted by this court, that the revocation of the license is essentially a punishment. The evil results, the fear of which has occasioned the decisions against the validity of provisions authorizing the revocation of a practitioner's license upon general grounds, can be avoided by reasonable interpretation.

The court next directed its attention to how the term "dishonorable conduct" should be interpreted, and in making the application to the instant case it was said:

Doubtless no conduct should be deemed "dishonorable" in such a sense as to warrant a forfeiture of a dentist's right to practice, unless it occurs in connection with the exercise of his profession and involves moral turpitude. The

expression "other dishonorable conduct," may be interpreted to mean conduct of the same general character as that already specified. . . . Whether or not the conduct of Richardson, as narrated by Mrs. Brack [the complaining witness in the instant case], constitutes what might be technically described as obtaining money by false pretenses, it was dishonorable conduct of a similar kind. . . .

In conclusion the Supreme Court reversed the judgment rendered in favor of the plaintiff, Richardson the dentist, by the trial court, and ordered that judgment be entered for the defendant board.

The Other Side of the Question.

The foregoing decision was carefully considered, and it is believed that it fairly represents the majority of jurisdictions in holding that statutes of this kind are not invalid because they state the causes for revocation in general terms. On the other hand, as noted in the beginning, there is a line of decision that takes the other view of the matter and declines to enforce the terms of revocation statutes unless the grounds are stated with particularity. As an example of the reasoning of this line of

cases, Green, *et al.*, Arkansas State Board of Dental Examiners *vs.* Blanchard, an Arkansas case reported in 211 S. W. 375, 5 A. L. R. 84 is worthy of examination. The facts in the case in so far as material to this article were as follows:

The Arkansas statute regulating the practice of dentistry gave power to the State board to revoke dental licenses for cause. There were a number of grounds upon which revocation might be predicated, among them the following:

"The publication or the circulation of any fraudulent or misleading statements as to the skill or method of any person or operator." Or, ". . . in any way advertising to practice dentistry or dental surgery without causing pain or advertising in any other manner with the view of deceiving or defrauding the public or in any way that would tend to deceive the public. . . ."

The State board of dental examiners revoked the license of Dr. F. A. Blanchard for alleged violations of the statute quoted from above. The evidence upon which the board based its judgment, it

seems, consisted of advertisements which Dr. Blanchard had used in the conduct of his practice. Among the exhibits of this kind appeared the following, which illustrates the nature of the advertising matter used:

> Blanchard's Dentists are Specialists. Each Thoroughly Efficient in His Own Line. Dental Work is divided into parts at Blanchard's. If a tooth is to be pulled, you are attended by an expert extractor who understands this thoroughly. If a crown is to be made, an expert laboratory man does this, and so on. You are thus assured of work as good as the best.

From the order of the board revoking his license Dr. Blanchard appealed to the circuit court where a judgment was rendered setting aside the order of the board. The board thereupon prosecuted an appeal to the Arkansas Supreme Court. On this appeal the board relied on the power given it under the portions quoted from above, contending that the words "deceiving or defrauding" the public included the acts of Dr. Blanchard proved by the board. The contention, it seems, being that it would have been impossible for the Legislature to set out in detail all acts which these

words embrace, and "that their meaning should be considered by the common judgment of mankind."

In answer to this it was contended that the provisions of the statute relied upon by the board were "so vague and indefinite as to make the statute inoperative and invalid for that reason." Cases were cited by both sides in support of their respective contentions, and in passing upon the points involved the court referred to the statute in question, and in reaching its conclusion, reasoned, in part, as follows:

What the Court Decided.

It does not advise the dentist in advance of what act or acts may be in violation of its provisions. Subdivision 2 and the words, "deceiving or defrauding the public," have no common law definition. They are not defined in the statute and have no generally well-defined meaning in the decision of courts. Under the statute, a dentist might do an act neither violating moral law nor involving moral turpitude, and which he regarded as strictly proper, and still his acts might, in the opinion of the board, be such as were calculated to deceive or defraud the public. Different standards might be established by different boards. It is well known that the dif-

ferent schools of medicine and even of dentistry have widely divergent views as to the treatment of certain diseases. It must be remembered that the statute does not prohibit advertising, however unprofessional and unethical we might consider that to be. It only prohibits advertising with the view of "deceiving or defrauding the public or in any way that would tend to deceive the public." So the members of one school of medicine or dentistry might advocate a certain treatment and in good faith advertise it to the public, which might be condemned by members of another school as calculated to deceive and defraud the public. The members of the profession are usually men of intelligence and good citizens. We do not believe that they would be guilty of such a multiplicity of wrongful acts that their conduct could not be safely regulated by a specified legislative enactment. . . .

However, the court made it perfectly plain that it upheld the right of the Legislature to enact a statute providing for the revocation of dental licenses, but it was pointed out that such a statute should designate, or make clear, the acts which would warrant the exercise of such power. On this point it was said:

It is competent for the Legislature to declare for what acts or conduct a license may be revoked, and to vest in State boards the au-

thority to investigate and try the charges which may be made under a statute; but the statute should specifically name or designate the offenses or wrongful acts which shall constitute a cause for revoking his license, so that the dentist may know in advance whether he has violated the terms of the statute. . . .

The court in conclusion, after disposing of other features of the case not material to this article, affirmed the judgment of the circuit court setting aside the order revoking Dr. Blanchard's license, holding, as outlined in the opinion, that the parts of the statute relied upon by the board were too uncertain and indefinite for enforcement. It should be noted, however, that the opinion was rendered by a divided court, Chief Justice McCulloch filing a vigorous and well-reasoned dissenting opinion which was concurred in by Justice Smith.

It is believed that the two cases reviewed are fairly illustrative of the reasoning of the courts in the respective lines of decisions to which they belong. And it seems these holdings may be summarized as follows: By the weight of authority statutes authorizing the

revocation of dental licenses for cause are valid even though the causes are stated in general terms. On the other hand, the minority rule holds that for such statutes to be enforceable they must specifically define the causes for revocation, so that those concerned may know in advance what act or acts will constitute grounds for such action.

CHAPTER XII.

Right of Physician and Surgeon, by Virtue of His License as Such, to Practice Dentistry.

THE question of the right of a physician and surgeon to practice dentistry, by virtue of his license as a physician and surgeon, is one of interest to both professions. And in this connection, it may be stated broadly that, in the absence of a statute to the contrary, one duly licensed to practice medicine and surgery would, it seems, have the right to practice dentistry. This on the ground that the practice of dentistry is a branch of surgery, and a license to practice the latter would include the former.

However, during the past few decades, this status has been greatly changed by legislative enactments which have tended to divide the field of medicine and surgery, and make dentistry a separate calling. Where this is the case we find separate statutes; one regulating the practice of medicine and surgery, and the other regulating the practice of dentistry. And where such dental acts do

not expressly except physicians and surgeons from their operation (which they do, however, in many States), the question of the right of a physician to practice dentistry, by virtue of his license as a physician, is one of some difficulty.

This point has been passed upon in a number of well-considered cases, and the decisions are not precisely in accord. It has been held that one duly licensed to practice medicine and surgery may also practice dentistry, the latter being held to be a branch of surgery, without complying with the dental statute. On the other hand, other courts have taken the position that a license to practice medicine and surgery could not also be made to cover the practice of dentistry, in the face of a statute making them separate callings. The reasoning of the courts may perhaps be best illustrated by a review of a case from each class, and as an example of the holding that a license to practice medicine and surgery also covers the practice of dentistry, State *vs.* Beck, 21 R. I. 288, will serve. The facts which culminated in the action were, briefly stated, as follows:

The defendant, a duly licensed physician and surgeon, was indicted for the alleged unlawful practice of dentistry. In his defense the defendant entered a plea in bar in which he set up the fact that he had been licensed to practice medicine and surgery in all its branches, "upon all parts of the human body, including the teeth," the contention being that, as dentistry was a branch of surgery, the defendant's license to practice the latter would cover his practice of the former without special compliance with the dental statute.

To this plea in bar the attorney-general demurred. The case then reached the higher court on the pleadings, and in deciding the question raised the court first examined the statute regulating the practice of medicine and surgery, in connection with the act regulating the practice of dentistry. In stating its conclusions the court reasoned, in part, as follows:

Practice of Dentistry by Physician Upheld.

Now, by the express terms of said chapter 165, a person holding a certificate, in accordance with the provisions thereof, is authorized

to practice medicine and surgery in all its branches. Dentistry is now a well-recognized branch of surgery. A dentist is a dental surgeon. He performs surgical operations upon the teeth and jaw and, as incidental thereto, upon the flesh connected therewith. His sphere of operations, then, as before intimated, is included in the larger one of the physician and surgeon. A fair and reasonable construction of the two statutes taken together, therefore, comes to this: That the general assembly, by the use of the broad and general language used in said chapter 165 relating to the authority to practice medicine and surgery, must be held to have intended to except physicians and surgeons from the restrictions imposed upon other persons regarding the practice of dentistry by said chapter 165 and the amendments thereto.

This view is strengthened by the fact, which is common knowledge, that it has always been the custom in this State, and probably everywhere else, for physicians to treat ailing teeth, to extract teeth, and to perform various other professional services which technically come within the purview of dentistry. Physicians who reside in the country towns especially have always been called upon, to a greater or less extent, for the performance of such services. And now to prohibit them from thus treating their patients would be a source of great inconvenience, and, in many cases, of extreme hardship and suffering to the latter, as well as an interference with the purpose

and legitimate functions of the former. And, as said by defendant's counsel, any construction of the law that prevents the general practitioner from treating any part of the human body, or restricts him in the discharge of his professional duties, would be a menace to the public health, and would deprive the physician of the right to practice a branch of his profession that is as old as the history of medicine itself.

After further consideration of the question before it the court concluded by sustaining the defendant's plea in bar. Holding that, under the laws of Rhode Island, one duly licensed to practice medicine and surgery was entitled to practice dentistry, as a branch of surgery, without complying with the particular statute relating to the practice of dentistry.

The Other Side of the Question.

This then brings us to a consideration of that class of cases in which it is held that a license to practice medicine and surgery does not, of itself, give the holder the right to practice dentistry. For this purpose State *vs.* Taylor, 106 Minn. 218 will serve; the facts involved being, in the main, as follows:

The defendant, a licensed physician and surgeon, was convicted of practicing dentistry without a license under the Minnesota dental act. This act, among other things, provided as follows:

> No person shall practice dentistry in the State without having complied with the provisions of this subdivision. . . . Any person who shall . . . violate any provisions of this subdivision shall be guilty of a misdemeanor. . . . All persons shall be said to be practicing dentistry, within the meaning of this section . . . who shall for a fee, salary, or other reward paid or to be paid either to himself or to another person . . . replace lost teeth by artificial ones.

The defendant it appears extracted two teeth for one of his patients and took an impression which he sent to a dental laboratory. Thereafter the artificial teeth were returned to the defendant, who, in turn, delivered them to his patient, receiving a fee of $38 for his services.

It was conceded that the defendant did not have a license to practice dentistry. The defendant, however, contended that his license as a physician and surgeon entitled him "to engage in the incidental practice of dentistry on

his own patients." This, it seems, on the ground that the practice of medicine and surgery included the practice of dentistry. The case went up on appeal, and while conceding the practice of medicine and surgery included the practice of dentistry, "in its broad and comprehensive sense," the court in reply, in part, said:

> But, for reasons of public policy, with which we have no particular concern, the Legislature adopted the policy of dividing the field of medicine and surgery, and making a separate profession of a part thereof. . . . It was thought that men who engage in the treatment of the diseases of the dental organs should receive special preparation and be specially licensed to practice that particular branch or department of medicine and surgery. . . . A State board of dental examiners was created and authorized to determine who should be licensed and entitled to practice dentistry in the State. . . . A department of dental surgery was also established at the university, with a course of study, the satisfactory completion of which would entitle the student to a special degree of dental surgery. An examination of this course shows that it includes a considerable part of the work required in the medical school, but it also includes studies which relate particularly to diseases of the dental organs and others de-

signed to insure efficiency in the mechanical work connected with the treatment. . . .

The court having examined the statute relating to the practice of medicine and surgery earlier in its opinion, now directed its attention to the dental statute, heretofore quoted from. Then in stating its conclusions, in the light of these statutes, the court, in part, said:

License to Practice Medicine Held Not to Cover Dentistry.

The Legislature has thus defined both the practice of medicine and the practice of dentistry, and made of them two distinct professions. This statute relating to dentistry makes no exception in favor of one who holds a certificate entitling him to practice as a physician and surgeon. We can find no implied exceptions in this statute. The words "no person," in a criminal statute, are to be given their literal meaning. From an examination of the statutes of other States relating to the practice of dentistry, we learn that many contain express exceptions in favor of physicians and surgeons. Probably the most of them permit physicians to extract teeth or perform such other comparatively simple work. In the absence of any such exceptions, we must conclude that the Legislature intended to restrict the scope of the practice of the

physician and surgeon, and require him, if he desires to practice dentistry, to obtain a license from the State Board of Dental Examiners in addition to his other certificate. . . .

In accordance with the foregoing opinion the court concluded by affirming the judgment of the lower court, in which the defendant was convicted of practicing dentistry without a license, holding that the possession of a license to practice medicine and surgery did not entitle the defendant to practice dentistry in Minnesota unless he also complied with the dental statute and obtained a license to practice dentistry.

It is believed that the two foregoing cases constitute a fair cross-section of the case law of the subject under discussion, and it is obvious from their holdings that, as cases of this kind must necessarily be decided in the light of the statutes of the State in which the question arises, the subject cannot be covered by the statement of a hard-and-fast rule. However, generally speaking, the law on the question of the right of a physician, by virtue of his license as such, to practice dentistry, may be summarized as follows:

Summary.

In the absence of a statute to the contrary one holding a license to practice medicine and surgery will also have the right to practice dentistry. And in the States which except physicians from the operation of their dental acts, either entirely, or in part, physicians of course have the right to practice dentistry so long as they keep within the restrictions, if any, of the Dental Act. However, in the States where the practice of dentistry has been made a separate profession from medicine, and where physicians and surgeons have not been excepted, the court decisions construing them are not in accord. In Rhode Island, as we have seen, the court construed such a statute as excepting physicians and surgeons from its operation. On the other hand, the Minnesota court declined to imply an exception, in the absence of express terms to that effect, and held that the holder of a license to practice medicine and surgery was not entitled to practice dentistry by virtue of such license.

CHAPTER XIII.

What Constitutes "The Practice of Dentistry" Within Meaning of Dental Practice Statutes.

In the enforcement of statutes regulating the practice of dentistry and providing penalties for violations thereof, the courts have from time to time been called upon to define the "practice of dentistry" in the light of the provisions of these statutes. The question has usually been raised by the contention of an accused person that the acts complained of did not amount to the "practice of dentistry" within the meaning of the particular dental act under which such a person was indicted, which necessitated the construing of the statute in the light of the particular acts ascribed to the person accused.

And in this connection, it may be stated at the outset that precise uniformity in the holdings of this class of cases cannot be expected, because of the varying provisions of the dental acts of the various States. However, the point

is without doubt one of considerable interest to the dental profession, and an examination of some of the cases in which dental statutes have been construed, in relation to the subject under discussion, may prove of interest and profit. And as a beginning State *vs.* Reed, 68 Ark. 331, will serve:

In this case the defendant was indicted for practicing dentistry without first obtaining a certificate. It seems the defendant was a student in the office of Dr. Milam, a duly licensed dentist, and the indictment alleged that he extracted teeth and filled them. He made no charge for the extraction, but, it appears, he charged and received the sum of $10 for the filling; and further, it seems, the defendant did not make the charge in the name of his employer, Dr. Milam, but for himself.

Now, the Arkansas statute, under which the indictment was drawn, provided: "It shall be unlawful for any person to practice or attempt to practice dentistry, or dental surgery, in the State of Arkansas, without first having received a certificate from the Board of

Dental Examiners; provided, this shall not be construed as preventing any regular licensed physician from extracting teeth, nor to prevent any other person from extracting teeth, when no charge is made therefor by such person."

Upon the trial of the cause the trial court, among other things, instructed the jury: "If the defendant had set up as a regular practicing dentist, he would be guilty; but if he was there learning the business under Dr. Milam, and practicing under his directions and advice, he is not guilty."

The trial resulted in the acquittal of the defendant. An appeal was taken, and in reversing the judgment of the lower court, the Supreme Court of Arkansas, in part, said:

Student Held Answerable to Statute.

From the language of the act under which this indictment was found, it is impossible to escape the conclusion that the performance of dental work, and charging and receiving pay therefor, is practicing dentistry. The theory of the trial court seems to have been that, notwithstanding this, yet, as the defendant was, when he did this work, a mere student and doing his work under the direction

of Dr. Milam, a licensed dentist, he was not answerable to the law on the subject. It must be noted, however (if this is any defense at all), that while this relation existed between the defendant and Dr. Milam at the time, so far as the dental work was concerned, yet the charge for the same was not made in the name of Dr. Milam nor was the pay received for him. The charge was made by the defendant for himself, independent of Dr. Milam, and so was the pay received by him.

Another case of this class, somewhat similar to the foregoing, was State Board of Registration and Examination in Dentistry *vs.* Terry, 73 N. J. L. 156. The facts involved being substantially as follows:

Section 8 of the New Jersey dental act provided in substance that the act should not prohibit a registered student of a licensed dentist from assisting in dental operations, in the presence of and under the direct and immediate personal supervision of his preceptor.

An action was brought against the defendant for violation of the dental act and the trial court charged, in part, "That if the jury found that the defendant while practicing was doing so as a

student of a regularly licensed dentist, the verdict should be for the defendant." The trial resulted in a judgment for the defendant. An appeal was taken and in passing upon the foregoing charge of the trial court the higher court, in part, said:

> We think the charge was erroneous. The exception in Section 8 is not an exception of all students in all circumstances. It is narrowed to a registered student while assisting his preceptor in the preceptor's presence, and under his direct and immediate personal supervision. . . . There was evidence indicating that the defendant was not an assistant, but rather a principal, and that the dental operations he performed were performed independently and on his own responsibility, and not under the direct and immediate personal supervision of the alleged preceptors. The defendant did not bring himself within the exception of Section 8 merely by proving that he was a student without proving the other qualifications in that section.

The judgment of the lower court was thereupon reversed and the case remanded for a new trial.

It will be observed that in the two preceding cases the holdings turned on erroneous instructions given by the trial

courts, in relation to the facts and the terms of the respective statutes being construed. Now we come to cases of a somewhat different class in that their holdings turn more on the particular acts complained of, in relation to the terms of the statutes, which it was alleged had been violated. For example:

Washington Statutes Construed.

In State *vs.* Newton, 39 Wash. 491, the defendant was charged with practicing dentistry without a license in that he did "treat a disease and lesion of the human teeth and did correct malpositions of the human teeth. . . ." The evidence showed that a patient went to the office where the defendant was employed and had dental work done; that this patient secured a set of false teeth, that they did not fit properly, and that the patient returned them, another impression was taken, and a new set of teeth was made; and that this defendant performed the work outlined.

The trial in the lower court resulted in the conviction of the defendant. An appeal was taken and in passing upon the

record the higher court, among other things, said:

> It is contended by appellant [defendant below] that the acts testified to did not constitute the practice of dentistry, as alleged in the information. Did the taking of the impression, the making of false teeth, and the fitting thereof in the mouth constitute a correction of a "malposition" or of "malpositions" of the jaws? This is the question. As to whether or not making the teeth or taking the impression would, each separately or together, constitute this, we do not decide. But taken together with the actual fitting and adjustment to the jaws, we hold that it constitutes a "correction of malposition of the jaws" within the meaning of the statute.

The case was reversed on error in the admission of certain evidence, which does not, however, detract in any way from the holding relative to the acts complained of constituting the practice of dentistry. Another interesting case of this class was State *vs.* Thompson, 48 Wash. 683; the facts being in the main as follows:

The defendant was convicted of practicing dentistry without having a license. The evidence showed that the defendant agreed to make a mouth plate for a

patient for $5; that in fitting the plate he extracted a tooth, took an impression, and collected $3 on account. It was also shown that at the time the defendant informed the patient that he was making no charge for the extraction of the tooth. The case reached the higher court on appeal and in deciding whether or not the acts set out constituted the practice of dentistry the court, in part, said:

Taking Impression Held "Practice of Dentistry."

The acts of appellant [defendant below] clearly constituted the practice of dentistry . . . . While appellant made no independent charge for extracting the tooth, that was a necessary part of the work in fitting the plate to the mouth, because the plate could not be fitted or the impression taken without the removal of the tooth. The charge, therefore, covered that as much as any other part of the work. But the taking of the impression was itself practicing dentistry, because that act was for the purpose of correcting a malformation of the jaw by inserting a tooth in place of the one removed. The evidence was clearly sufficient. . . . .

The judgment of the lower court was thereupon affirmed.

And in State *vs.* Sexton, 37 Wash. 110, the defendant was convicted of practicing dentistry without having a license, and prosecuted an appeal to the higher court, contending that the evidence was not sufficient to justify the submission of the case to the jury. In affirming this judgment the higher court, among other things, said:

> There was evidence that the appellant cleaned the teeth of Netzer, [the patient] removing tartar therefrom, and made an examination of them in order to give an estimate of the cost of "having them fixed"; that he "sounded" them and "picked" them. While part of this evidence was contradicted, it was nevertheless sufficient to carry the case to the jury, and, if believed, to justify a verdict of guilty under the provisions of the law in question. . . .

The foregoing decisions are fairly illustrative of that class of cases in which the courts have defined "the practice of dentistry," and found the alleged acts complained of to constitute a violation of the law. And now let us examine a case in which the acts complained of, owing to the provisions of the statute in the State in which they arose,

were held not to constitute the "practice of dentistry." For this purpose State *vs.* Faatz, 83 Conn. 300, will serve; the facts out of which the action grew were substantially as follows:

The defendant, it appears, was a young man employed in the office of Dr. Jackson, a duly licensed dentist, in the State of Connecticut. The defendant did not have a license to practice dentistry, but he placed some cotton in a tooth of a patient, and the next day he filled the tooth. A charge of $1.50 was made for this, and collected by the defendant, not for himself, but for Dr. Jackson, his employer.

Thereafter an information was filed against the defendant charging that he did "perform dental operations on patients, in the office of a licensed dentist, without a license from the Dental Commissioners of the State of Connecticut." The State contended that the performance of the acts described above constituted a violation of the Connecticut dental statute. This statute provided in substance that no person should practice dentistry without first

obtaining a license from the dental commissioners, and, further, that "the unlawful practice of dentistry for each week shall be a separate offense." From a conviction in the lower court an appeal was taken, and in construing this statute, in connection with the charge in the information, the higher court, among other things, said:

What the Court Decided.

A "dentist" is one whose business is to clean, extract or repair natural teeth, and to make and insert artificial ones. "Dentistry" is the art or profession of a dentist. The "practice of dentistry," then, is the practice of the art or profession of a dentist. Engaging in this practice of dentistry without a license is made a crime by this law.

This information does not charge the defendant with the offense of "engaging in the practice of dentistry without a license." Quite evidently the public prosecutor did not intend to so charge. If he had, he would undoubtedly have followed the language of the statute. But he does charge that the defendant performed dental operations on patients in the office of a licensed dentist without a license. The theory of this prosecution is that an unregistered assistant or student of a licensed dentist cannot perform a single dental operation without becoming liable un-

der this act, and that the act forbids this. . . . This view is erroneous. Such dental operations are not in terms forbidden, and the language of the act cannot be extended by implication. . . .

We cannot indorse the position that performing a dental operation is the same thing as engaging in the practice of dentistry. This appears to have been the view of the trial court. In the charge to the jury the court makes no distinction between "engaging in the practice of dentistry" and "performing a single dental operation." He treats them as one and the same thing. There was error in this and consequent harm to the defendant. . . .

A young man may be preparing to enter the dental profession, but he cannot, within the meaning of the statute, be said "to engage in the practice of dentistry" until he embarks in it, until he holds himself out as a dentist, either by a series of continuous acts, covert or open, or by advertising himself in some way as a dentist or as a doctor of dental surgery. If he holds himself out to the public as a duly qualified dentist, embarked in the profession, and offers to practice as such, this would be engaging in the practice of dentistry within the true sense and meaning of this act, even though his first patient had not yet called. . . . This act is intended to protect the dental profession from ignorant and incompetent practitioners, as well as to protect the public against the same kind of

ignorance and incompetence in men setting themselves up as dentists, or in other words, "engaging in the practice of dentistry."

The statute is a benign one and its purpose is good, and if properly and legitimately enforced, it is a useful one: but it should not be strained by construction to include terms and restrictions not intended by the Legislature, as that intent is manifested by the language used. . . .

Had the Legislature really intended to make it a crime to perform any dental operation without a license, it would and could have found language to express that intention with clearness and certainty. It had no difficulty in expressing such intention clearly in the act relating to the practice of medicine passed at the same session. . . .

Had the Legislature anticipated the case now before the court, they perhaps would have employed in this statute expressions prohibitory of the act which this defendant is being prosecuted for. Such expressions, however, do not appear there, and this statute therefore has not been violated. . . .

In conclusion, the court reversed the judgment rendered below, holding, as outlined in the opinion, that the information upon which the case was based did not charge a crime within the meaning of the terms of the dental statute relied upon.

It is believed the foregoing reviews present a fairly representative section of the case law of the subject under discussion. And as each case has necessarily been decided on the facts involved, in the light of a particular statute, it is not then surprising that the holdings are hardly subject to classification except as to results. This, however, does not detract from their individual value, for each holding announces the rule of construction followed in the State where decided.

CHAPTER XIV.

Right of Dentist to be Excused from Jury Duty as a "Practitioner of Medicine."

STATUTES exempting physicians and surgeons from jury duty have, generally speaking, been upheld on the grounds of public welfare. For it is obvious that to compel a practicing physician and surgeon to serve upon a jury, perhaps involving a trial of many days or weeks, might work a real hardship upon the community which he serves. And while statutes of this kind vary somewhat in their terms, they commonly prescribe that a "practitioner of medicine" shall be exempt from jury duty. This, then, raises the question of whether or not a dentist is a "practitioner of medicine" within the meaning of the statutes of this kind.

The point, while certainly of interest to the dental profession, appears to be one upon which there is little authority. However, in State *ex rel.* Fliekinger *vs.*

Fisher, 119 Mo. 344, the question was passed upon in Missouri, the action being based upon the following facts:

The relator, a practicing dentist in good standing, claimed exemption from jury duty on the ground of being a "practitioner of medicine" under the provisions of the Missouri statute. The section of the statute upon which this contention was based provided that one actually exercising the functions of a "practitioner of medicine" should be exempt from jury duty.

This claim of the relator was opposed, it being contended that the practice of dentistry, in the light of the Missouri statute exempting "practitioners of medicine" from jury duty, was not the practice of medicine. After stating the question before it the higher court proceeded to examine the qualifications required under the Missouri statutes of those seeking to practice medicine and surgery, and of those seeking to practice dentistry.

In this connection it was noted that "every person practicing medicine and surgery, in any of their departments, shall possess the qualifications required by this article." The article then pre-

scribed that if the applicant was a graduate of medicine he should present his diploma to the State board of health, and the latter should issue a certificate. The article also provided that those who were not graduates of medicine should be entitled to certificates, after a successful test before the board as to their qualifications. The article also provided a fine of from $50 to $500, to which might be added a prison sentence of from 30 to 365 days, which might be imposed upon one convicted of the unlawful practice of "medicine and surgery in any of their departments."

On the other hand, the section entitled "Dentistry," provided in substance that it should be unlawful for anyone to practice dentistry or dental surgery in the absence of a diploma. There were no requirements, however, that such diploma should be filed with the board of health, nor for any examination by the board of an applicant's qualifications; the applicant simply filed his diploma with the proper official and received a certificate entitling him to practice dentistry under the statute, the penalty for violation of the dental act being a fine of from $25

to $200. The court, after a consideration of the respective statutes governing the practice of medicine and surgery and the practice of dentistry, among other things, said:

The Statute Construed.

These different penalties . . . evidently go to show that the Legislature regarded the violation of Article 1 by a physician as a more serious offense, and therefore to be punished more severely than a violation of Article 3 by a dentist. In a word, by those very penalties they drew a distinction between a *doctor* and a *dentist*.

Relator [the dentist] relies on a certificate obtained under the provisions of Article 3 aforesaid, from the city register, on presentation to the latter, by the relator, of his diploma, which certificate among other things states that relator's name had been entered on the "Roll of Dental Surgeons" in the city register's office.

Looking at these statutory provisions bearing on the point in hand, the question mentioned at the outset recurs to the mind: Do those provisions, or any of them, exempt relator from the performance of jury duty?

. . .

Here it cannot be successfully claimed that relator finds any exemption in the *terms* of the statute, for certainly he is not a "practitioner of medicine and surgery in

any of their departments," as defined in Section 6871, nor does he exhibit the qualifications required by that section, to wit, a diploma from a legally chartered medical institution in good standing and a certificate from the board of health. His contention, stripped of all verbiage and disguises, and stated baldly and boldly, simply is that, inasmuch as he possesses a diploma, granted him by a reputable *dental* college, and a certificate of the city register showing the filing of that diploma and the enrolment of his name on the "Roll of Dental Surgeons," that therefore he is entitled to the same exemptions from jury service as if, instead of qualifying under the provisions of Section 6889 [those relating to dentists], he had actually qualified under those of Section 6871 [those relating to doctors]. This contention, . . . cannot prevail; it will not bear a moment's scrutiny.

Either relator is a practitioner of medicine and surgery, or he is not. If not, that determines this litigation against him; if he is such a practitioner, then this fact avails him nothing until he complies with the terms and conditions of Section 6871 and its associate sections. The law, by the terms it employs, means a *lawful* "practitioner of medicine," not one who fails to comply with its requirements. Relator makes no pretense of such compliance. The statute in question being couched in unambiguous terms, its words are to be taken "in their plain or ordinary and usual sense."

The premises considered, we hold that, on the facts presented in this record, relator is not exempt from jury duty, and hence deny the peremptory writ.

It will be noticed that the court, in the foregoing opinion, appears to have based its decision solely upon the wording of the statutes, without consideration of the basic reason for the exemption statute in favor of physicians and surgeons. In other words, it seems the court gave no credit to the analogous relationship to the general public occupied by the doctor and the dentist; and this despite the fact that the main reason for allowing a doctor an exemption from jury service, *i. e.*, the public welfare, seems to apply with equal force to the dentist.

Perhaps had the court started its reasoning upon the assumption that dentistry is a branch of medicine and surgery, as it has been held, and not seemingly confined itself to a strict construction of the words employed, without consideration of the reason for the conceded exemption of doctors from jury duty, a different conclusion might have been reached. This appears very likely in view of the fact that the opinion reviewed

above was rendered by a divided court, four judges concurring, while three joined in a dissenting opinion. This dissenting opinion is well worth reading in connection with the review of the case, as it tends to support this view of the majority opinion; and incidentally it furnishes a striking illustration of how learned men may disagree in their conclusions drawn from the same facts. In this dissenting opinion it was, among other things, said:

Excerpt from the Dissenting Opinion.

The question turns upon the meaning of the provision that "No person . . . exercising the functions of . . . practitioner of medicine . . . shall be compelled to serve on any jury. . . .

Exemption from jury service is not granted as a personal favor, but for the public comfort and convenience, and in the light of this reason for its existence should the law governing such service be interpreted and administered.

While the law on this subject and the reason for its existence remains the same today as on the day of its first enactment, its application now is not so simple as it was in the beginning, and for many years thereafter. While the early practitioners of medicine in

the State were not necessarily M.D.'s or doctors of medicine in the technical sense of the schools, they were all called doctors, and as such exercised the functions of doctors of medicine, surgeons and dentists, and generally treated indiscriminately all the ailments that human flesh and bone is heir to, whether external or internal, according to the light they possessed; and such continued to be the case down to the memory of the present generation, and doubtless still remains so in many of the rural districts of the State. But in the cities and more populous districts we now find the functions formerly exercised by the doctor or practitioner of medicine of the olden time, divided up and exercised by specialists, each confining himself generally to the practice of a particular branch or department of the science, such as surgeons, dentists, oculists, aurists, etc.

While dentistry, as an independent calling, may have had an humble and comparatively recent origin, it has now become a very important branch of medical science,* and there are but few who have arrived at the age of those who are usually called to serve as jurors, who would not testify that when the exercise of its functions become necessary it is as exigent as the exercise of most of the other functions of the general practitioner.

The fact that this branch of the medical

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*Address of N. S. Davis, M. D., president of the American Medical Association.

profession has grown to such proportions as to have its own independent colleges, and to confer its own degrees, and that it has become necessary that its practice should be regulated by statute . . . indicates the importance of the exercise of its functions to the public welfare. The fact that it is regulated in a separate article and as an independent calling from that of an M.D., does not in any manner affect the character of those functions. . . .

The relator under the present law is authorized to exercise all the functions thus recognized that belong to his department of medicine. They are now more extensive, more important and more exigent to the public welfare than they ever were before. He is within the purview of both the letter and reason of the law that exempts "a practitioner of medicine" from jury duty, and should have a peremptory writ commanding his discharge.

So we have both sides of the question under discussion presented in this Missouri case. And while, of course, the majority opinion announces the law of the case, there is no gainsaying the fact that the reasoning in the dissenting opinion is very persuasive. However, in fairness to the majority opinion, it should be remembered that the question before it was not simply whether a den-

tist was a practitioner of medicine, but rather whether a dentist was a practitioner of medicine *within the meaning of the Missouri statute exempting such from jury duty.* With this in mind it is obvious that the court was presented with a difficult question as is shown by the disagreeing opinions rendered.

CHAPTER XV.

Duties and Liabilities of Dentist in the Administration of Anesthetics.

GENERALLY speaking, the dentist is held to a high degree of responsibility in the administration of anesthetics; he is bound to know that he is employing dangerous agencies, and his responsibility begins with his examination of the patient with this in view. It follows that he may be liable in malpractice if injury results from his negligence in the administration of the anesthetic, or in the conduct of the operation in connection therewith. This point is illustrated in a number of cases, among them McGhee *vs.* Schiffman, 4 Cal. App. 50, which involved the following facts:

The defendant dentist undertook to extract certain teeth for the plaintiff, and with this in mind administered an anesthetic. Four teeth were extracted during this period, and the plaintiff was placed a second time under the influence of the anesthetic for the purpose of ex-

tracting three more teeth. The plaintiff was rendered entirely unconscious during these operations, and when she regained consciousness, after the second administration, she was strangling and coughing. The subsequent history of the case, as described in the report, was as follows:

> That she continued this coughing and became sick; that an abscess formed in the lower lobe of the lung and quantities of yellow pus were expectorated; that her condition was such as might be expected to result from a foreign substance in the lung; that afterward, during a fit of coughing she expelled from her lungs a tooth. It appears further that plaintiff was in perfect health before she entered defendant's office to have such teeth extracted; that from that day she began to be sick and thereafter was continuously under the care of a physician; that after the tooth was expelled, though in a weak condition, she began to improve.

The instant suit was thereafter filed against the defendant for damages on account of the injuries described above, the contention of the plaintiff being that her injuries were caused by the defendant's negligence. The trial resulted in a judgment for the plaintiff, and the defendant appealed, contending, among

other things, that the evidence was insufficient to establish negligence on his part. In reviewing the evidence on this point the higher court, in part, said:

It was further in evidence that by the use of ordinary care the extractor could keep the mouth of the patient clear of blood and in case a tooth should escape from the forceps, as is frequently the case, he is able to remove it; that constant care is necessary to be exercised that teeth may not escape into the trachea; that a skilled operator keeps track of the teeth as extracted and knows when he has taken them all from the month, and examines the teeth actually extracted to see that no fragments are left in the mouth; that in the exercise of ordinary care the operator could discover whether any of the teeth or any fragments thereof had not been removed from the mouth. It further appears that a tooth slipping from the forceps may pass into the lungs; that the use of nitrous oxid as an anesthetic would increase the possibility of a tooth escaping from the mouth into the windpipe.

Defendant Held Negligent.

After the foregoing examination of the evidence the court in announcing its conclusion, among other things, said:

There is no evidence in the record that defendant took any of the precautions before

mentioned, or made any observations to see whether or not he had completed his task. In addition to all this, there was evidence tending to show that ordinarily a patient regaining consciousness will not cough; that if coughing and strangling ensue after consciousness is regained, it is recognized as an evidence of the fact that a foreign substance has escaped, and that unusual and great precautions are thereupon taken by the operator to cause its immediate removal; that notwithstanding plaintiff's coughing and giving every evidence of having some foreign substance in her windpipe, no attention was paid to her by the defendant and no effort made to ascertain the cause of her unusual condition. There was, therefore, competent evidence tending to establish the averments of the complaint, not only as to the negligence, but as to the proximate cause of the injury. . . .

The court thereupon affirmed the judgment rendered in the lower court in favor of the plaintiff. Holding that the evidence sustained the finding of negligence against the defendant which permitted a recovery by the plaintiff.

Another interesting case of this class, which contains a valuable discussion of the degree of care required of the dentist in the use of anesthetics, was Keily *vs.* Colton, 1 New York City Court, 439.

The facts which culminated in the action were, considerably abbreviated, as follows:

The defendants were dentists, and in extracting a tooth for the plaintiff, the latter being under the influence of an anesthetic at the time, permitted a part of the tooth to escape and go down the plaintiff's throat. The plaintiff suffered pain and in about four weeks, during a coughing attack, the tooth was expelled. The instant suit for damages was thereafter filed, and resulted in a verdict for $500, in favor of the plaintiff. The defendants appealed and in passing upon the record, and announcing the rule of care required of the defendants in situations of this kind, the higher court, in part, said:

Highest Skill and Diligence Required.

There was nothing hurtful in the anesthetic administered to the plaintiff, and the fact that he was put under its influence is material only in determining the amount of care which the defendants were called upon to exercise. They knew that the plaintiff, while under the influence of the anesthetic, had no control of his faculties; that they were powerless to act, and that he was unable to

exert the slightest effort to protect himself from any of the probable or possible consequences of the operation which they had undertaken to perform. He was in their charge and under their control to such an extent that they were required to exercise the highest professional skill and diligence to avoid every possible danger, for the law imposes duties upon men according to the circumstances in which they are called to act. In this case skill and diligence must be considered as indissolubly associated. The professional man, no matter how skilful, who leaves an essential link wanting or a danger unguarded in the continuous chain of treatment is guilty of negligence, and if the omission results in injury to the patient, the practitioner is answerable.

After the foregoing statement of the rule of care required in situations of this kind, the court directed its attention to the *quantum* of evidence necessary to sustain a verdict, in connection with the nature of the injury complained of. With the instant case in mind the court, in part, said:

The defendants were employed to take the diseased tooth out; instead of doing which they allowed part of it to go down the plaintiff's throat. This was out of the ordinary course of treatment, and how such an unusual result was brought about was a fact

peculiarly within the knowledge of the defendants, which they were required to explain, and it was for the jury to say whether their explanation was satisfactory or not.

The *quantum* of evidence necessary to make out a *prima facie* case of negligence is very slight in some cases, while in others more strict proof is required. Often the injury itself affords sufficient *prima facie* evidence of negligence. . . Although the mere happening of an accident is not in general *prima facie* evidence of negligence, yet the accident may be of such a nature that negligence must be assumed, from the unexplained fact of the accident happening. . . . There was evidence offered by the plaintiff showing that while the defendants drew the tooth the forceps slipped. This fact, combined with the unusual circumstance that the tooth went down instead of coming up, was sufficient to carry the case to the jury upon the question of negligence. . . .

In conclusion the court said:

The case was fairly tried and submitted to the jury, and their verdict, in view of all the facts and the pain and suffering which the plaintiff endured, cannot be said to be improper nor excessive. It follows that the judgment must be affirmed, with costs.

When Dentist Not Liable.

In the foregoing cases, it will be noted that the actions were based on alleged

negligence of the defendants in performing the operations while the patients were under the influence of anesthetics. This, then, brings us to a consideration of a different phase of the question which concerns itself with the limitation of the dentist's responsibility in situations of this kind. And in this connection it may be stated:

That while, as we have seen, the dentist is held to a high degree of responsibility in the administration of anesthetics, yet he is only bound to look to natural and probable effects. In other words, he is not liable for injuries resulting from the peculiar condition or temperament of his patient of which he did not have knowledge. This point may be illustrated by a brief review of Bolger *vs.* Winslow, 5 Phil. 136.

In this case the plaintiff was a street-car driver, and about one year before the injury complained of had suffered an accident by being thrown from his car and striking his head. He had, it appears, continued to work and thereafter he suffered with his teeth, and went to the office of the defendant for the purpose of having the offending teeth extracted.

The defendant had no knowledge of the prior accident that the plaintiff had suffered, and administered chloroform in the extraction of the teeth. The chloroform, it appears, did not operate as soon as usual, and tended to excite the patient. Insensibility was finally obtained, however, and the teeth were extracted.

The plaintiff walked home after the operation and complained of dizziness and a tendency to totter. The next day he complained of thickness of utterance and numbness of one side and arm. Several days thereafter he suffered a partial paralysis from which he had not recovered when the suit against the defendant, dentist, was filed. In charging the jury the trial court, among other things, said:

The Question Stated.

The question in issue is, whether this is attributed to the neglect of Dr. Winslow (the defendant). The defendant is not answerable unless two things appear: First, that he was guilty of negligence or want of skill in administering the chloroform; and, second, that the disease which followed was the result of the use of this remedy.

The court then in reviewing the evidence observed: That the medical experts testified that chloroform was a proper agent sanctioned by science and experience. This expert testimony also tended to show that paralysis was not a natural or even possible consequence of the giving of chloroform. And the evidence showed that the defendant was skilful in his profession and especially conversant with the administration of chloroform, being frequently called upon by eminent surgeons to give it for them. Then in closing its charge the court said:

If the plaintiff was, from previous circumstances, predisposed to paralysis, it might well happen that the extraction of his teeth without the chloroform, or the use of chloroform without the extraction, would bring on a paralytic attack.

Even if this was the case still it would not be just to make the defendant answerable for consequences which he could not foresee, which were not the ordinary or possible result of what he did.

He was only bound to look to what was natural and probable, to what might reasonably be anticipated. There is nothing to show that he was made acquainted with the accident that had befallen the plaintiff, or had any reason to suppose that there was

greater danger in his case than that of other men. Unless such guard is thrown around the physician, his judgment may be clouded or his confidence shaken by the dread of responsibility at those critical moments when it is all-important that he should retain the free and undisturbed enjoyment of his faculties, in order to use them for the benefit of the patient.

The trial resulted in a verdict for the defendant.

Summary.

So it may be said in summing up: That in administering an anesthetic the dentist is bound to exercise the highest degree of care, both in his determination to use it and in its use. And an injury resulting from his negligence in situations of this kind may make him liable in malpractice, and if death should result he might be charged with manslaughter.

On the other hand, the dentist is only required to look to the natural and probable effects of the administration of an anesthetic upon his patient.

CHAPTER XVI.

Judicial Construction of Libel and Slander of Dentist in His Professional Capacity.

Broadly speaking, any false defamatory words, written and published, constitute libel, and if spoken constitute slander; and perhaps no branch of the law has been more fruitful of long, bitter, drawn-out litigation than that section devoted to this subject. For as cases of this kind have usually been based upon a keen sense of outraged honor, they have for the most part been prosecuted with vigor and persistence to the last ditch.

Of the reported cases of this class quite a number have concerned physicians and surgeons, but a careful search has disclosed but few instances where dentists have been active parties. However, as the principles involved are equally applicable to dental practitioners, a brief sketching of cases in which the words used were held actionable, when applied to physicians and surgeons, may be of value. For example:

Where it was said of a surgeon: "He is no good, only a butcher. I would not have him for a dog;" these words were held to constitute slander *per se*. And where it was said of a physician: "He has killed the child by giving it too much calomel," the words were held actionable. So too under certain circumstances the charging of a physician and surgeon with being a "quack" has been held to amount to grounds for an action for damages. In fact, generally speaking, any charge against a physician of unprofessional conduct in the treatment of his patients is actionable.

However, it should be noted that each case of this kind must necessarily be decided in the light of the particular facts involved, which makes the statement of a hard and fast rule difficult. But, nevertheless, any publication which tends to degrade, injure or bring a person into contempt or ridicule, or which accuses him of a crime, or other disgraceful act, is libel. As an illustration of the application of this rule of law Cady *vs.* Brooklyn Union Pub. Co., 51 N. Y. 198 is of interest. The facts which culminated in the action were, in the main, as follows:

Publication Announced Suicide of Dentist.

The plaintiff in this action was a practicing dentist in the city of Brooklyn, N. Y. The defendant published in its newspaper a statement to the effect that the plaintiff had committed suicide in Baltimore, Md., by shooting himself. Thereafter the plaintiff brought an action for damages against the defendant on account of this publication, and was awarded a verdict in the lower court.

The defendant prosecuted an appeal on the ground that the words published were not libelous *per se,* and as no special damages had been claimed, no cause of action was alleged. It was further contended by the defendant that, as no malice was shown, the plaintiff was not entitled to recover. In answering these contentions, in the order in which they have been stated, the higher court, in reviewing the case, among other things, said:

The trial proceeded mainly on the theory that the published words were libelous *per se* as touching the plaintiff in his profession, for to publish of him that he had committed suicide was at least as injurious to him in

his profession as would be a publication that he had suddenly abandoned his home and practice and gone to parts unknown, and that would be libelous. But I think they were also libelous *per se* without regard to his profession. . . .

From early times the rule is of familiar statement, that not only do oral words which amount to slander *per se* constitute libel *per se* if written, but that in addition any written words soever which hold one up to disgrace, hatred, ridicule or contempt, are libelous *per se*, however much they may fall short of charging a criminal offense, or of amounting in any other respect to slander if only spoken. . . .

The court next directed its attention to the second contention of the defendant, *i.e.*, that as no malice was shown in the publication it was not actionable. In reply to this it was, in part, said:

But malice in the defendant is not, and never was, an essential ingredient in an action for damages for an ordinary libel or slander. It is only necessary where the occasion of the speaking or publishing of the defamatory words was qualifiedly privileged. There malice in the defendant has to be shown, and is a necessary ingredient of the cause of action, in order to defeat the privilege. The common saying that malice is essential to maintain all civil actions for

slander or libel is an inadvertence, and no judge or writer who has considered it has accepted it. It is folly, for no matter how good one's motives may have been in speaking or publishing unprivileged defamatory matter, that constitutes no defense to an action for damages therefor. No verdict for the defendant to an action for ordinary libel or slander could stand upon a charge by the trial judge to the jury, that if they found no malice in the defendant the verdict must be for the defendant. . . .

Then, after further consideration of the question before it, the court in conclusion said:

Publication Held Libelous.

I think the effect of the publication concerning this plaintiff must have been to subject him to general ridicule, which in legal presumption causes damages, and that makes it libelous *per se*. Everybody would say of him, "There goes the dentist who committed suicide." His profession, or craft, was properly considered on the question of how much actual damage must have been caused to him by the publication.

The court thereupon denied the motion of the defendant to set aside the verdict rendered in the lower court in favor of the plaintiff. Holding that the

publication, as outlined heretofore, was libelous *per se,* and gave the injured dentist a right to recover.

The foregoing opinion is fairly illustrative of the reasoning of the courts in construing alleged libelous publications, and as noted heretofore, broadly speaking, any false publication which tends to degrade, injure or bring a person into ridicule, or which accuses him of a crime or other disgraceful act, is libel. However, in this connection it may be noted that before one can successfully claim damages for libel he must positively connect himself with the alleged libelous publication, and this connection must be made from the alleged libel and cannot be supplied by innuendo by the aggrieved person. This point is illustrated in a striking manner in Gunning *vs.* Appleton, 58 How. Pr. 471, under the following facts.

The plaintiff was a practicing dental surgeon and treated William H. Seward for a fracture to his lower jaw. This treatment by the plaintiff of William H. Seward, along with the success of the treatment, it seems, attracted wide attention at the time. Thereafter the de-

fendants, who were publishers, published in their journal, the *New York Medical Journal,* the following item touching on this occurrence:

The late William H. Seward, when traveling around the world, and when in Yokohama, Japan, required the services of a dentist. Upon examination it was found that the inferior maxilla was comparatively useless for masticating purposes, there being a false joint at the seat of the original fracture, no union having taken place.

This case will be remembered from the worldwide notoriety of the circumstances attending the injury, as well as the reports, which have been universally believed, that the patient was benefited by the treatment he received for the cure of his fracture.

Dental Surgeon Brought Action for Alleged Libel.

Following the foregoing publication the plaintiff brought the instant action against the defendants for $25,000 damages for alleged libel. The plaintiff in his complaint set forth the alleged libel, as above, then he further alleged, by way of innuendo, as follows:

The said late Wm. H. Seward suffered during his life an injury to his lower jaw, whereby the same was fractured, and said

fracture was treated for the cure thereof by this plaintiff, and this plaintiff had sole charge and care, professionally, of such treatment. The result of said treatment was that the said lower jaw was so restored as to be used efficiently by the patient, and the said treatment by this plaintiff resulted in a successful cure of said fracture, and both in and out of this plaintiff's profession the result of the said treatment has enhanced this plaintiff's reputation and standing as a dental surgeon.

The said treatment and cure have received great attention both in this country and elsewhere, and this plaintiff has publicly and privately reported that the said William H. Seward was benefited by the treatment he received for the cure of said fracture, which treatment was under the sole professional charge of this plaintiff.

That the reports of said treatment and cure, referred to in the publication above set forth, were prepared and disseminated by this plaintiff, and at the time of said publication, the said defendants knew that said reports were so prepared and disseminated by this plaintiff.

That the said defendants, in and by said publication, charged and intended to charge this plaintiff with falsely and fraudulently claiming and reporting that the said Seward was benefited by the treatment he received from this plaintiff as a dental surgeon, for the cure of the said fractures.

The said publication was false and de

famatory, and calculated to, and did, seriously injure this plaintiff in his reputation, good name and credit, and by reason thereof this plaintiff's practice as a dental surgeon is seriously impaired, and his professional reputation, good name and credit are materially injured. . . .

To the foregoing complaint the defendants filed a general demurrer, which was sustained, and the case went up on the pleadings. In passing upon the issue raised the higher court, among other things, said:

What the Court Decided.

In my judgment the language upon which this action is founded is not defamatory on its face. It assumes to give an account of a circumstance in which many others besides plaintiff may be presumed to have had an interest. He is not therein referred to personally or as one of a class. A fair criticism of the alleged libel would convey the idea that Mr. Seward, when at Yokohama, was examined by a dentist who discovered that the fracture Mr. Seward had sustained was not then cured. It was not alleged that no subsequent cure was effected, or that he was under treatment by plaintiff prior to the examination had at Yokohama.

All that can be claimed, as against the defendants, is that they published as a fact that which the examination disclosed,

namely, that the "reports which have been universally believed that the patient was benefited by the treatment he received for the cure of his fracture" were erroneous. . . .

After a careful consideration of the whole scope and object of the publication, which were germane to the legitimate purposes of a medical journal, I am of opinion that no malice is presumable from the publication in question, and that no right of action has accrued to plaintiff therefrom.

The court thereupon affirmed the judgment of the lower court. Holding that the publication complained of was not libelous, and that the plaintiff could not maintain his action. So, to sum up:

Generally speaking, words which tend to injure or bring a dentist into ridicule and contempt, or which accuse him of crime or other disgraceful act, or charge him with unprofessional conduct in the treatment of his patient, constitute libel if written and published, and slander if spoken. However, as previously noted, whether a given case of alleged libel or slander may be brought within this rule will of course depend in a great measure upon the particular facts involved, which precludes the statement of a hard and fast rule applicable in all cases.

CHAPTER XVII.

Limitations Upon the Practice of Dentistry in Respect to Overlapping into the Field of Medicine or General Surgery.

THE question of the limitations upon the practice of dentistry in respect to overlapping into the field of medicine or general surgery, appears to be one of interest to dentists in general. Especially does this seem true in cases where a dental practitioner is perhaps specializing in oral surgery, for example, and does not hold an M.D. degree in addition to his D.D.S.

But a careful search of the books discloses little authority directly upon the point in question, and the writer has not found even one case which contains anything like an exhaustive discussion of this feature of dental jurisprudence. However, *in re* Carpenter, 196 Mich. 561, a certain phase of the question was up for decision, which entailed a considera-

tion of whether or not certain acts performed by a dentist would amount to the practice of medicine. So, while the decision did not require the announcement of any broad rules on limitations of the practice of dentistry in respect to overlapping into medicine or general surgery, it did hold that the acts set forth did not amount to such an overlapping, and in view of the paucity of authority upon the subject its holding becomes one of considerable interest and value.

Dentist Treats Cancer of the Mouth.

In this case the claimant was a duly licensed and practicing dentist. The decedent, it appears, had suffered for some months from an incurable cancer of the mouth. The claimant treated the decedent up until the time of her death, and thereafter filed a claim for services rendered against the estate of the decedent. The nature of the services rendered are clearly shown by the bill of particulars, which greatly abbreviated was as follows:

To treating and cleansing cancer of the mouth three times a day—77 days, at $2.00 per day	$154.00
To treating and cleansing cancer four to six times a day—64 days, at $3.00 per day	192.00
April 14, 1915. Cocain and antiseptic	4.00
June 1, 1915. Cocain and antiseptic	4.00
June 23, 1915. Cocain and antiseptic	4.00
	$358.00

Certain payments had been made upon the bill, which reduced it to the sum of $138.00 at the time it was filed against the estate. Upon the trial of the cause the evidence showed that the decedent had been attended by Dr. Huntington, a regular practicing physician and surgeon, and that Dr. Huntington knew that claimant was caring for the cancer; that he had in fact instructed claimant to "administer antiseptic and anesthetic drugs."

Upon the conclusion of the claimant's case counsel for the estate asked for a directed verdict. This request was made upon the grounds, among other things,

"that the services rendered by claimant were rendered for the treatment of a cancer by a man not shown to be legally qualified to practice medicine in the State of Michigan; that a treatment of cancer by a dentist is a treatment in violation of the law."

The court denied the motion for a directed verdict and submitted the case to a jury. The latter returned a verdict for the full amount claimed to be due, and the estate prosecuted the instant appeal from judgment thereon. In stating the principal question before it the higher court said:

> The only question of importance involved in this case is whether the claimant in doing what he did for the decedent was engaged in the practice of medicine contrary to the provisions of Act 237 of the Public Acts of 1899, as amended.

After the foregoing statement of the point up for decision the court addressed its attention to a consideration of the record in connection with the statutory enactments which controlled the situation. In this connection it was, in part, said:

Held Proper Treatment Within Dental Practice Act.

The record shows beyond question that the treatments administered by the claimant were so administered from the very first under the direction of a duly qualified physician, . . . It further shows that such treatments were necessarily administered from three to six times each day; the lesion in the jaw being extremely painful and emitting a discharge highly offensive in odor. It further appears that in the administering of said treatments some skill was required. We are of opinion that claimant was entitled to recover upon either of two theories: First, that the services rendered were those of an ordinary nurse under the direction of a competent and duly qualified surgeon; and, second, that they were rendered by claimant as a duly qualified dentist under the provisions of Act 183, P. A. 1913, section 7 of which provides:

"Any person shall be said to be practicing dentistry within the meaning of this act . . . who shall . . . treat diseases or lesions of the human teeth or jaws, . . . or who shall, for a fee, salary, or other award paid or to be paid, . . . treat diseases or lesions of the human teeth or jaws."

The treatments administered by the claimant would clearly fall within the definition of the practice of dentistry contained in the statute. We are of opinion that claimant in rendering the services for which claim is

made was not practicing medicine within the meaning of Act 237, P. A. 1899, nor of Act No. 368, P. A. 1913. . . .

In conclusion the court affirmed the judgment rendered below in favor of the claimant. Holding, as outlined in the opinion, that the treatments given by the claimant were clearly such as he was authorized to give as a duly licensed and qualified dentist.

As noted heretofore there appears to be very little judicial authority upon the subject under discussion, and while the foregoing Michigan case was decided in the light of the provisions of the statutes of that State, its holding can hardly fail to be of interest to the dental profession generally. It furnishes a guide post, at least in a measure, upon what otherwise appears to be a road almost without sign or marking in respect to judicial definitions upon its boundaries.

CHAPTER XVIII.

Judicial Construction of Evidence Relative to Degree of Care Exercised in the Practice of Dentistry.

Broadly speaking the law requires that a dentist, in the practice of his profession, use the ordinary care used by other practitioners of ordinary skill in his locality. It follows that, in a given case, the question of whether or not the dentist has satisfied the requirements of the law will usually be a question of fact depending upon all the facts and circumstances surrounding the particular case.

For this reason care is a relative term and cannot be covered by the statement of a hard-and-fast rule. And, in view of this, it seems probable that the legal requirements in the matter of care, may be best illustrated by the examination of actual cases in which the courts passed upon evidence in situations of this kind. With this in mind a case of each class will be taken, *i.e.*, one in which the evi-

dence submitted was held insufficient to show lack of the required care; and one in which the proof offered was held sufficient. As an example of the first named class of cases Robbins *vs.* Nathan, 179 N. Y. S. 281, will serve.

In this case the plaintiff went to the office of the defendant and told the latter that one of her teeth was "bothering her." The defendant examined the offending tooth, which was crowned with an artificial crown supported by the natural crown, and removing the crown ascertained that the tooth was not filled. Defendant then made a radiogram from which he found that the root contained decomposing organic matter. The defendant thereupon advised the plaintiff that the tooth should be extracted.

The plaintiff agreed to this and requested that gas be administered. Great difficulty was experienced by the defendant in bringing about complete unconsciousness in the patient, but finally with the aid of a trained nurse, who was in the employ of the defendant, and the plaintiff's husband, who it seems arrived at the office at this time, the defendant

succeeded in administering sufficient gas, and the tooth was extracted.

Thereafter the plaintiff brought the instant action against the defendant for damages. In support of this, to paraphrase, the plaintiff, among other things, claimed that in removing the tooth it was broken; that the defendant made repeated efforts to extract the root; that in the course of these efforts the defendant administered cocain, breaking the needle of the instrument used; that the broken needle was removed from her gum with forceps.

That following the operation she fainted; that thereafter her mouth was very sore, and that pieces of bone and flesh were subsequently cut away by another dentist to whom she applied for treatment. That she was thereafter treated by this latter dentist, also by a physician, and spent some time in a sanitarium.

Upon the trial of the cause in the lower court the plaintiff recovered a verdict against the defendant for alleged malpractice. The defendant carried the case up on appeal and in reviewing the evidence, and deciding as to its

sufficiency to place liability upon the defendant, the higher court, among other things, said:

Dentist Held Not Liable.

It seems to me that this case necessarily involves a holding that if a person has a tooth extracted, and thereafter his mouth is sore or he is ill, the dentist is responsible. This is not the law. The court correctly charged the jury:

"The defendant was not a guarantor of his work, or the result that would follow; he is not an insurer as to the result. In other words, in this case, he was required to use the ordinary care of such a man having the ordinary skill in this locality; and, if he does not, the mere fact that there is a bad result is not enough, but you have got to trace it to his lack of skill, or his negligence." . . .

Applying that rule, what facts are there upon which to base a finding of the defendant's liability? The defendant extracted the plaintiff's tooth, but there is not a hint or claim that it was not necessary. He administered gas, and had some difficulty in doing so. The plaintiff desired it, and there is no proof that it was improper to do so, that too much was administered, or that it could have been done by any other method. Her mouth bled, but this is usual, ordinary, and unavoidable. The cavity looked large to the plaintiff. Again this was the usual

and ordinary result. No one else having special knowledge upon the subject confirmed her opinion. She had difficulty in talking. Two teeth had been removed—one natural tooth and an artificial tooth attached to it. This difficulty was disagreeable, natural, and temporary. . . .

Plaintiff claims her lips were cut and bleeding. When plaintiff struggled, so that even with the help of a nurse defendant was unable to administer gas, and was only able to do so with the added assistance of plaintiff's husband, this result can not be attributed to any lack of skill or negligence upon the part of the defendant. These are all of the immediate physical effects of the operation. It is true that the plaintiff was ill afterwards, and that illness may have been attributable to the extraction of this tooth, but that does not warrant holding the defendant liable, as he does not, under the law, guarantee the result. . . .

If the treatment of the defendant was unskilful or negligent, it was incumbent upon the plaintiff to show it by those qualified to testify to the proper method of performing such an operation; and if the untoward results present here might have been avoided by due care, the duty of showing that was also on the plaintiff. . . .

I am not unmindful of the fact that in some cases the lack of skill or want of care is so obvious that expert testimony is unnecessary. . . . This, however, is not such a case, and the counsel for the respondent in

his brief fails to point out anything which the defendant did or omitted to do that indicated absence of skill or lack of care. He merely refers to results, and claims from these a want of care may be inferred. But these, as previously stated, are not of such a character as to warrant that inference without the aid of medical testimony. . . .

In conclusion the court reversed the judgment rendered below in favor of the plaintiff, and dismissed the complaint with costs, holding the evidence of record to be insufficient to cast any liability upon the defendant.

The Other Side of the Question.

This then brings us to a consideration of a case of the second class heretofore mentioned, *i.e.*, those in which the evidence introduced was held to be sufficient to support a judgment. For this purpose Kenpher *vs.* McKenney, Dentists, *et al.*, a Nebraska case reported in 185 N. W. 412, will serve. The facts which culminated in the action were, briefly stated, as follows:

The plaintiff had a small cavity in one of his lower molars and went to the offices of the defendants for treatment.

Dr. Paige, an employee of the defendants, and also a defendant in the action that hereafter followed, examined the plaintiff, and advised that the molar be filled, also that another molar adjacent to it be filled as it too showed signs of decay.

Dr. Paige thereupon filled the teeth and shortly thereafter the plaintiff complained of pain. The doctor, it appears, informed him that many people did not lose the feeling from the effect of a filling for several hours. Two days later plaintiff returned to Dr. Paige complaining about the pain, and called the doctor's attention to a swelling in his face.

Dr. Paige thereupon put some medicine around the teeth and gum, and a few days later plaintiff again returned, suffering with pain and with his face swollen more than before. Another doctor examined plaintiff's teeth and reported to Dr. Paige that an abscess had started. Dr. Paige attempted to drill the filling out, but plaintiff was unable to stand the drilling at that time. Thereafter, it seems, another doctor in the employ of the defendants took

charge of the plaintiff's case. The latter cut an opening into the tooth and treated it, and after a second examination he advised plaintiff to have the tooth extracted.

Plaintiff was thereupon sent to Dr. Houston, a specialist, who, it appears, first radiographed the teeth, then extracted one. Several days later it became necessary to remove the other tooth and Dr. Houston also extracted it.

Thereafter the instant suit for damages was filed against the defendants. The x-ray picture of the two teeth, as well as the teeth, were placed in the record at the time of the trial. The trial resulted in a verdict in favor of the plaintiff for $500. The defendants prosecuted an appeal to the higher court where in reviewing the record, and weighing the evidence, it was, in part, said:

What the Court Decided.

Plaintiff's own testimony as to his suffering and sleepless nights is, of course, uncontradicted. But there is a conflict in the testimony of the doctors when it comes to reading the x-ray picture. Dr. Harry Foster testified that the picture shows in the second

molar the filling touching on the prongs in the pulp; that in the third molar it does not touch the pulp. Other doctors called express their doubt or deny that it touches at all.

The testimony shows that the tooth pulp is very sensitive and is full of nerve tissue, and that a filling set on the pulp would cause severe pain, and, if not sterilized or the canals filled with sterilizing material, an abscess would result. Dr. Harry Foster testified that there should be between the filling and the pulp, a non-conductor; that gutta-percha was sometimes used to cap the pulp, and that there appeared to be nothing between the pulp and the silver amalgam in the tooth in question. As a matter of fact, Dr. Paige admitted that he did not cap the pulp.

We think that the jury were justified in believing the witnesses for the plaintiff, and their verdict on conflicting evidence should not be disturbed unless clearly wrong. . . .

In conclusion, after passing upon other matter not material to this discussion, the court affirmed the judgment rendered in the lower court in favor of the plaintiff. Holding, as outlined in the opinion, that, while conflicting, there was sufficient evidence upon which to base a judgment for damages against the defendants.

Summary.

The foregoing cases are fair examples of judicial reasoning in weighing evidence in situations of this kind. In the first case it will be noted that the plaintiff, it appears, failed completely in her proof of negligence that could be ascribed to the defendant. The claims and proof appear to have solely concerned the result of the extracting of her tooth. So, while the jury gave her a verdict, the higher court refused to let it stand on the evidence of record.

In the second case, however, we have a quite different situation. Here the plaintiff makes a charge of negligence and offers expert testimony in support of his allegations. True the testimony of his witnesses was, it appears, disputed by those of the defendants, yet the offering of this testimony by the plaintiff placed the matter in the hands of the jury, and was such that the higher court declined to interfere with the verdict. Taken together the two foregoing holdings form a reasonably clear example of how, generally speaking, the courts weigh and construe evidence of malpractice suits which involves the question of care and negligence.

CHAPTER XIX.

Judicial Construction of Insurance Policy Indemnifying Dentist Against Damage Suits Based on Alleged Malpractice.

THE dentist, in the practice of his profession, can hardly expect to escape entirely the danger of at some time being called upon to defend an action for alleged malpractice. This danger in respect to dentists is perhaps not so great as it is with physicians, but nevertheless, by the nature of the calling, it is ever present in some degree, and insurance against it has its advantages.

However, if the dentist decides to carry insurance of this kind he should not lose sight of the fact that, if the protection sought is to be attained, the terms of such a policy should be complied with. This is true, because such a policy is but a contract and, unless the dentist brings himself within its terms and conditions, the insurance company may be able to defeat its liability under it.

The importance of a strict compliance with the terms, stipulations and conditions of insurance policies of this kind is illustrated in an interesting and instructive manner in Betts *vs.* Massachusetts Bonding and Insurance Company, 90 N. J. L. 632. The report is somewhat long and involved, but in so far as material to this paper the facts were, briefly stated, as follows:

The plaintiff, Dr. Betts, a duly licensed dentist, contracted with the defendant company whereby the latter agreed to protect him under certain terms and conditions against alleged malpractice suits. The contract also contained a paragraph protecting the plaintiff against such suits which might be based upon the acts of any assistant of the plaintiff. This paragraph provided as follows:

Material Terms of the Policy.

The defendant company agreed to protect him "against loss from the liability imposed by law upon the assured from damages on account of bodily injuries or death suffered by any person or persons

in consequence of any alleged error or mistake or malpractice, by any *assistant* of the assured while *acting* under the assured's instructions."

The policy also carried certain conditions, among them being condition "B," which, to quote the language of the report, provided as follows:

"The company shall not be liable under the policy for any claim against the assured or any assistant arising from the violation of any law or ordinance on the part of the assured."

Now it appears that Dr. Betts had in his employ as an assistant a dentist from another State, who was not licensed to practice in New Jersey. This dentist, Dr. Snively, performed a dental operation upon one Klitch which led the latter to bring a damage suit against Dr. Betts. Klitch recovered a judgment against Dr. Betts, the latter paid the judgment, and instituted the instant action against the defendant insurance company in an attempt to recover upon the policy outlined above. The insurance company defended the action, and among other things contended as follows:

That the respondent [Dr. Betts] knew that Snively was not licensed and registered to practice dentistry in this State, and nevertheless was employed and held out by respondent as his assistant in performing dental operations, which was in express violation of the dentistry act, which statute makes such conduct a misdemeanor, and therefore the respondent does not come into court with clean hands, and should not be permitted to make his unlawful act the basis of a right to recover; that in the application for the policy of insurance the respondent stated that he employed no physician, surgeon or dentist regularly on a salary or commission except Dr. Charles L. Snively, and thereby he falsely represented that Snively was a licensed and registered dentist of this State, and that being so, he subjected the insurer to a risk which was not contemplated by it and which was concealed from the insurer, and, therefore, the contract of insurer became void. . . .

Upon the trial in the lower court Dr. Betts recovered a judgment against the insurance company. The latter carried the case up on appeal and in passing upon the issues before it the higher court, among other things, said:

What the Court Decided.

The appellant [the insurance company, defendant below] was entitled to rely on the

safeguards which the law erected against improper and illegal practice of dentistry which tends to lead to error, mistake or malpractice.

The record in Klitch *vs.* Betts *supra* [the case heretofore mentioned in which Dr. Betts was compelled to pay a judgment for the acts of his assistant Snively] establishes the uncontroverted fact that Snively, both unlicensed and unregistered to practice dentistry, did, as an assistant to Dr. Betts, a licensed dentist, in the dental office, and in the absence of Dr. Betts, perform several dental operations upon Klitch and treated the latter's injured jaw resulting from such operations. These acts were clearly in express violation of the statute which forbids dental operations by an unlicensed person. The record also clearly shows that Betts employed and permitted Snively to perform dental operations while he was an unlicensed person, which was a clear violation of the policy.

Snively's acts, being both unlawful and unauthorized, and not having occurred while acting under the assured's instructions, by force of the provision of the insurance contract which limits the liability of the insurance company to injuries or death in consequence of any alleged error or mistake or malpractice, by an assistant of the assured while acting under the assured's instructions, cannot, therefore, operate or create any liability on part of the insurance company to indemnify the respondent.

Besides this conclusive bar to the respondent's right to a recovery, condition "B" of the policy of insurance expressly provides that the insurance company shall not be liable under the policy for any claim against the assured or any assistant arising from the violation of any law or ordinance on the part of the assured. . . .

We think also that the respondent is debarred from recovering on the policy, because it appears that the basis of his claim of recovery is the unlawful act of Snively in which the respondent participated by holding Snively out as a licensed dentist to the public and to the appellant. . . .

Furthermore, it is to be observed that the statement made by the respondent in his application for insurance, that Dr. Snively was his assistant, was a material statement, since it related to the risk which the company was taking, and, besides, the respondent warranted the statement to be true when he knew that Snively was not authorized to practice dentistry in this State. This of itself is sufficient to avoid the appellant's liability on the policy. . . .

Conclusion.

In conclusion the judgment rendered in the lower court in favor of the plaintiff was reversed, holding, as outlined in the opinion, that for a number of reasons the plaintiff was not entitled to recover against the insurance company.

The foregoing New Jersey case is the only case that the writer has discovered dealing with the construction of an insurance policy of this kind which had been issued to a dentist. And while of course each case of this kind must necessarily be decided in the light of the particular facts and the terms of the policy involved, yet this New Jersey holding adheres to the general rules usually applied in construing policies of this kind.

It follows, in the light of this decision, that a reasonable compliance with the terms and conditions of a policy of this kind is imperative if the insured is to reap the benefits of the contract. For, as illustrated in the foregoing case, any material breach of the terms, beginning with the application, where the statements therein are warranted, may defeat the liability of the insurance company under the policy.

CHAPTER XX.

Dissatisfaction of Patient with Dental Services Rendered as a Defense to Action for Payment.

THE dentist, in common with men and women of other professions, will in the practice of his calling come in contact with all kinds and conditions of people. It follows that his measure of success will depend, at least to a considerable extent, upon his ability to attract and hold a following. For, regardless of how efficient he may be in the actual performance of his professional duties, if he lacks tact and judgment in dealing with the peculiar whims and idiosyncrasies which he is bound to meet, he may fail to attain a measure of financial success commensurate with his professional ability.

And while the great majority of people are without doubt reasonable in their demands and appreciate efficient and fair treatment, yet once in a while the dentist may expect to encounter an in-

dividual who is, to say the least, hard to please. If, then, such a person becomes dissatisfied with dental services rendered to such an extent as to refuse to pay, or perhaps to even permit the dentist to continue in his efforts to make the work satisfactory, the latter may have no choice save to lose the account or resort to law.

If the dentist decides to resort to law in a situation of this kind, the question of the legal sufficiency of the patient's dissatisfaction as a defense becomes one of considerable interest. And in this connection it may be stated broadly that dissatisfaction alone will not defeat a recovery by the dentist, providing the services were rendered in a workmanlike manner in accordance with the practice of other dentists in the same locality.

In other words, a dissatisfied patient cannot rely merely upon his or her dissatisfaction, but in addition must show some reasonable ground for such dissatisfaction if payment for the services is to be defeated. And it seems that the best evidence of the reasonableness of the grounds for such dissatisfaction must come from witnesses who are quali-

fied to testify as to the standards and practices of the dental profession. This point of dental jurisprudence is illustrated in an interesting manner in the recent case of Holsapple *vs.* Scofield, a Wisconsin decision, reported in 187 N. W. 682.

Facts in the Case.

In this case the defendant, a lady of over seventy, employed the plaintiff, a practicing dentist, to extract six remaining teeth in her lower jaw, and to make a set of artificial teeth for the lower and upper jaws. The plaintiff extracted the teeth, and after taking the necessary impressions, had the two artificial dentures made.

The dentures were tried in the defendant's mouth, and after several readjustments the defendant expressed her dissatisfaction. Thereafter, after having worn or tried to wear the dentures in all about four days, the defendant returned the dentures, declined to try them further, and refused to pay a balance due upon the account. The plaintiff thereupon brought the instant suit to enforce payment.

The action was commenced in a justice court and the plaintiff recovered a judgment. The defendant appealed to the circuit court where the case was tried before a jury and resulted in a judgment in favor of the defendant. The plaintiff thereupon carried the case to the Supreme Court of Wisconsin. Here in reviewing the evidence of the respective parties it was in part said:

Plaintiff, in addition to his own testimony, called three dentists as experts, and the substance of their testimony was that after extraction of so many teeth there would be a shrinkage of the substance that surrounded the roots of the teeth, and that such process takes considerable time and is slower in those of advanced years; that until there is such final settlement there can be no immediate complete or perfect adjustment of an artificial set of teeth, and that changes are required from time to time until there is a final settlement of the process and often new plates are then required; that it requires considerable time for a person to adjust himself to such a lower plate. . . . The dentists testified that the materials and workmanship were good, and the articulation—that is, the manner in which the teeth came together in the mouth—was properly arranged, and that the price charged by plaintiff was reasonable. They also testified that, al-

though in this particular set the upper teeth projected over the lower set, such was normal, usual and proper.

The defendant called no one who had any special or expert knowledge as to the nature of such work. The evidence offered on defendant's behalf was to the effect that the teeth did not fit properly in the mouth, and that the upper jaw projected too far beyond the lower, and she herself testified that at the time she was trying to use the set the lower plate caused her great inconvenience, pain and soreness.

After the foregoing review of the material parts of the evidence of the respective parties the court in stating the general rule relative to a recovery by the plaintiff used the following language:

General Rule of Recovery Stated.

If the plaintiff performed the dental services for the defendant and did the same in a good workmanlike manner in accordance with the recognized and established practice of those in the same profession in his locality, he became entitled to the reasonable value of his services.

The court next directed its attention to an examination of the evidence relative to whether or not it entitled the plaintiff to recover in accordance with

the rule announced above. In weighing the evidence upon which to base its conclusion it was, among other things, said:

> We must hold in this case that the issue here presented was one upon which expert rather than lay evidence was necessary. . . . The testimony of those familiar with that kind of work and services was all one way and to the effect that it was in accordance with the recognized standard of skill in that locality.
>
> It is uncontradicted that a satisfactory result could not in the nature of things be expected during the short time in which defendant attempted to try the teeth furnished by plaintiff, and she herself testifies that she refused to continue any further. . . . Neither court nor jury can use their own individual views nor those of persons unfamiliar with such particular subjects as proper basis for their findings as against the uncontradicted and unimpeached testimony of those who are qualified to know and speak on such subject. . . .
>
> It follows that the court should have set aside the verdict and have granted plaintiff's motion for the amount asked in the complaint. Judgment reversed, and cause remanded, with directions to render judgment for plaintiff.

The foregoing Wisconsin decision is one of great clearness and value to the

dental profession. In the light of the facts and holding, it is clear that mere dissatisfaction of a patient with dental services will not of itself be sufficient to enable such a patient to defeat recovery by the dentist. In addition, if the patient would win, it must also appear that the dissatisfaction was grounded upon some lapse of the dentist in performing the services, and proof of this kind must usually be weighed in the light of the qualifications of the witnesses offering it.

CHAPTER XXI.

Judicial Construction of Written Warranty of Dental Work

Davis *vs.* Ball, 60 Mass. (6 Cush) 505, was a case decided in 1850 involving the construction of a written warranty of work given by a dentist. The decision is probably of limited practical value owing to the infrequency with which written warranties are indulged in by the dental profession: however, the rule of law announced is as true today as when stated. The case carries a worth-while lesson on the importance of care when entering into a written contract and, to the writer's mind, it is also worthy of examination for the bit of dental history it reflects. The facts which culminated in the action were, briefly stated, as follows:

The defendants were dentists and had performed certain work for the plaintiff's wife. When the work was paid for the defendants gave the wife of the

plaintiff a receipt and warranty which provided as follows:

34 Tremont Row, Boston, 1847. Mrs. Davis to Drs. Ball & Co. Dr. Teeth filled, cleaned, inserted, extracted, and all operations in the best manner. To operations in dentistry, Aug. 20: Inserting one upper set and part of lower set of teeth on gold plate, warranted for one year; and if on trial they cannot be made useful, the teeth to be returned and the money refunded when called. Received payment, $110.

A. Ball & Co.

The plaintiff's wife, it appears, tried the teeth and did not succeed in making them useful to herself. The teeth were thereupon returned within a year from the date of the above warranty and a refund of the money demanded. This was refused and the instant action was instituted in an attempt to recover same under the terms of the warranty. The defense, as outlined in the report, was in substance as follows:

The defendants contended that there was a latent ambiguity in the words "made useful," which would be suggested by the inquiry "made useful by whom? By the plaintiff's wife, or by the subsequent adjustment of the defendants?" They thereupon contended, that

parol evidence was admissible to explain the ambignity, and for this purpose they offered evidence, first. to prove the undertaking and contemporancons construction of the parties, by their conversation at the time; and, second, to prove the custom of the trade or profession by other dentists. . . .

This evidence was rejected by the trial court on the grounds that there was no latent ambiguity in the writing and that to admit parol evidence to vary its terms would violate the parol evidence rule. The trial court held that by the terms of the writing the teeth were to be made "useful" by the plaintiff's wife, and that if after a trial they were not capable of being "made useful" by her the money was to be refunded. The trial resulted in a judgment in favor of the plaintiff, the defendant appealed, and assigned this exclusion of the evidence offered as error. In passing upon this contention the higher court, in part, said:

The writing is the best evidence of the contract ultimately concluded between the parties, upon which they intended to rely, and by which they intended to be bound. Then it was said, that the writing was a mere receipt, which might be contradicted. But so far from being a mere receipt, it was, in

terms, a clear and express contract of warranty. . . .

The evidence offered to explain a supposed ambiguity in the written contract was properly excluded for the reason assigned by the judge at the trial. If there is any ambiguity, it must be a patent ambiguity. But there is really no ambiguity, latent or patent. The construction put upon the contract by the judge at the trial was very clearly and manifestly correct.

There is no ambiguity in the words "made useful" and no difficulty arises from the inquiry "made useful by whom?" The answer to the inquiry is very obvious,—made useful by the person who was to try them and for whom they were designed. The teeth were made, completed, finished. Though ever so skilfully made, it was uncertain, as it necessarily must be from the nature of the case, whether the person for whose use they were designed would be able to use them. It was therefore agreed that if the plaintiff's wife, upon trying them, should find she could not use them or make them useful, she might return them, and the money should be refunded. . . .

The defendants' exceptions were thereupon overruled.

As noted in the beginning, the foregoing decision was decided in 1850, and it appears to be the only authority the books contain on the question involved.

This perhaps would be sufficient reason to include it in a paper of this kind, but to the writer's mind a better reason is found in its historical value, mirroring, as it does, certain phases of the status of dentistry as practiced in that day.

CHAPTER XXII.

Dentist as Medical Practitioner in Respect to Privileged Communications Made by Patient.

STATUTES forbidding physicians and surgeons from disclosing information received from their patients in their professional character have been widely enacted. And, while such statutes are obviously grounded upon a sound public policy, the courts in construing them have been inclined to stand squarely upon the letter of the law, and refrain from extending their operation by implication.

In accord with the foregoing construction such authority as the writer has been able to find has denied the application of statutes of this kind to practitioners of dentistry. It then appears that unless a statute specifically includes dentists, by the weight of authority, a dentist is not a surgeon or physician within the meaning of statutes making certain communications privileged when made to the latter. This point is illus-

trated in an interesting manner in People *vs.* De France, 104 Mich. 563.

In this case the defendant was being prosecuted for the alleged uttering of a forged draft. The case turned upon the question of identity, the defendant claiming that he was not the person who uttered the draft.

It appears that a man known as Forrest gave the draft and at the time his teeth presented a different appearance from those of the defendant at the time of the trial. The man Forrest's two front incisors were separated distinctly while the defendant's were not. In attempting to prove that the defendant was really the man Forrest the people called as a witness Charles H. Land, a dentist, who testified that between certain dates he had inserted three false teeth in the place of the two incisors for the defendant.

On appeal to the Michigan Supreme Court the question of whether or not Land's testimony was properly received arose. The defendant contended that the testimony of Land, the dentist, amounted to disclosing a privileged communication, and should not have been

received. In support of this the Michigan statute was cited which provided as follows:

No person duly authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient in his professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon.

In passing upon the question raised the court, among other things, said:

The question presented is whether this language includes a dentist. At common law, information gained by a physician or surgeon while in attendance upon his patient was not privileged. The purpose of this statute was to throw around such disclosures as the patient is bound to make for the information of his attending physician the cloak of secrecy, and the prime object of the act was to invite confidence in respect to ailments of a secret nature, and the spirit of the act would not include a case where the infirmity was apparent to every one on inspection.

In practice, however, the statute has not been so limited in construction, for the reason that the words of the act are broad enough to include any information necessary to enable the physician to prescribe or the

surgeon to act. Nevertheless, the purpose of the act is to be considered in determining whether the dentist was intended to be included within its terms. Certainly the terms "dentist" and "surgeon" are not interchangeable, and if a dentist is to be held to be a surgeon, within the meaning of this act, it must be because his business as a dentist is a branch of surgery.

It is apparent that the act relates to general practitioners, and to those whose business as a whole comes within the definition of "physician" or "surgeon." A dentist is one whose profession it is to clean and extract teeth, repair them when diseased, and replace them, when necessary, by artificial ones. . . . We think there was no error in admitting the testimony of this witness; that he is not within the terms or the spirit of the act. . . .

The foregoing case was decided in 1895, and of course the court in its reasoning had in mind the status and field of operation then occupied by the dental profession. The thought then occurs, that in view of the progress and expansion of dental science since that time, were the court deciding the question before it at this time might not a different answer be expected?

CHAPTER XXIII.

Dental Books as Being Within the Terms of Insurance Policy Insuring "Instruments, Appliances and Material Incidental to a Dental Office."

THE question of whether or not a dental library is included within the meaning of the terms of a fire insurance policy, insuring the "instruments, appliances and material incidental to a dental office," was passed upon in American Fire Insurance Co. *vs.* Bell, Tex. Civ. App. 11. And as this decision is probably the only authority on the precise point to be found in the books it becomes one of considerable interest to the dental profession, and well worth the attention of a brief review.

In this case the insured, a dentist, entered into a contract of insurance covering the equipment of his office against loss by fire. The policy of insurance contained, among other things, the following description of the property insured:

Office and sitting-room furniture, dental chairs, gas apparatus, vulcanizers, electric motors, screens, pictures, paintings and their frames, at not exceeding cost, ornaments, instruments, appliances and material incidental to a dental office. . . .

Thereafter the property insured was destroyed by fire and a dispute arose over the settlement under the terms of the policy. The matter reached the courts and in denying the claim of the dentist, that 350 dental books, which it was alleged had been damaged in the sum of $800, should be included in his loss by the terms of the policy, it was, in part, said:

Dental books may be, and doubtless are, very necessary to the proper operation of dental offices, but they cannot be classed as furniture, chairs, gas apparatus, vulcanizers, electric motors, screens, pictures, paintings, "instruments, appliances and material incidental to a dental office." The word "appliances" is very comprehensive in its meaning, but has never been so broadened and expanded as to comprehend books, and the close conjunction in which it is used with the word "material" shows clearly that it has reference to mechanical appliances, in connection with which the word is generally used. . . .

In the light of the foregoing holding it is clear that where a dental library is sought to be included in a policy of insurance insuring office equipment it should be specifically set out. If this is done there can be no dispute over this phase of the subject, in the event of a loss, and when the value of even a good working dental library is taken into consideration it would seem but prudent that it be protected along with the other office equipment.

CHAPTER XXIV.

Legality of Contract by Dentist to Furnish Patient Dental Services for Life.

A CAREFUL search of the American reports fails to disclose any direct authority upon the question of the legality of a contract by a dentist to furnish a patient dental services for life. Such a case involving a dental contract of this kind does not appear to have ever arisen in the American courts, though there is at least one well-considered medical case, on the point of which more anon.

The point was, however, up for decision in the English case of Allen *vs.* Davis, 4 De G. & S. 133, and while the case turned on the question of fraud, the language used no doubt reflects the English view on the legality of contracts of this kind. The facts and circumstances which culminated in the action were, in so far as material to this paper, as follows:

Upon the death of a Captain John

Simpson, a very old man, his executors were made aware that Mr. Davis, a dentist, asserted a claim against the captain's estate in the form of a bill of exchange for £262. 10s. Davis it appears turned the bill over to another medical man, Mr. Peplow, and the latter brought an action upon it, for the joint account of himself and Davis. In reply to this the executors of Captain Simpson brought the instant action which sought to compel the delivery up of the bill on the apparent theory that it had been obtained by fraud.

Contract to Furnish Dental Services for Life Alleged.

Peplow was non-suited at the trial, being unable to prove the captain's signature. Davis, however, defended the action, and his explanation of how he obtained the bill, to use the language of the court, was as follows:

The story is, that a very old man, Captain Simpson, having a room or a place in Greenwich Hospital, gave the bill, payable eight months after date, to the defendant Mr. Davis (a dentist), purporting to be, generally, for value received; and the bargain, as the dentist says, was that the dentist should,

during Captain Simpson's whole life, attend to his teeth, and supply him with new teeth. . . .

Following the above statement of Mr. Davis's explanation of how he received the bill, the court directed its attention to the circumstances surrounding the transaction in respect to whether there was evidence of fraud. In this connection it was, among other things, said:

The bill is for £262. 10s. The body of it is in the handwriting of the dentist, such part (if any) as is in the handwriting of the captain being the signature. It is said to have been given in the dentist's house, without the presence of a third person. Captain Simpson died before the bill became due; and it does not appear that any one had ever heard of it before his death. It does not appear that the contract to attend to his teeth was put in writing, or that there is or was any evidence of it, except the memory of Captain Simpson or Mr. Davis. There is not only this strange state of circumstances, upon Mr. Davis's own showing, but there is also (which is very suspicious) the conduct of Mr. Davis after Captain Simpson's death, the inaccurate manner in which he spoke and wrote upon the subject, and the circumstances also, that, instead of bringing the action in his own name, he placed the bill in the hands of another medical man, Mr. Pep-

low, to whom he owed a balance of £14 or £20 to put it in suit, the action being brought on the joint account of the two.

Dentist Denied Recovery on Alleged Contract.

Now, in a case of imputed fraud, the plaintiff is entitled to ask of the court, as a judge of fact, whether an inference of fraud—of gross fraud—arises from the case as Mr. Davis has himself stated it. And I think it quite impossible to ask any reasonable being to draw any different inference from such materials. The case has points of resemblance to the remarkable case of Dent *vs.* Bennett, in which a medical man in the north of Lincolnshire bargained for a very large sum of money to attend a person of advanced years. . . . And I am of opinion, that, . . . Dent *vs.* Bennett, . . . is a precedent . . . . for the exercise of the jurisdiction of the court in the present instance, though I do not ground my decision upon it. . . .

In conclusion the court made a decree ordering the bill to be given up. In other words holding that Mr. Davis, the dentist, was not entitled to enforce the claim, on the grounds, as has been outlined, that the transaction was so tainted with fraud as to render it unenforceable.

It will be observed that the foregoing case does not squarely pass upon the sub-

ject of the legality of a contract to supply dental services for life, as it turned upon the element of fraud. However, when the case is considered in conjunction with Dent *vs.* Bennett, 7 Sim. 539, the medical case cited by the court above, there can be little doubt but that the contract would have been declared void even had it not been tainted with fraud.

The last-named case, Dent *vs.* Bennett, seems to reflect the weight of English authority upon the question under discussion, and a brief review of its holding seems worth while. The facts of the case briefly stated were as follows:

A physician in England contracted with a patient, a very old person, to render the latter medical services for life in consideration of the sum of £25,000, same to be paid upon the death of the patient. In denying the legality of this contract the court, in part, said:

> It is plain that the existence of such an agreement is a direct premium to the medical adviser to accelerate that death upon the happening of which he is to have $25,000, and it is in vain to say that in fact it did happen that the party who was to give the £25,000 did live four or five years after the agreement.

You must look at the agreement as it stood at the time it was made; and it must be admitted that the human mind is so constituted as that this agreement might be a temptation to some persons to do the very thing which it is obvious it was the duty of the party who took the agreement not to do; and my deliberate opinion is that it is totally void in point of law for that reason.

The American Rule.

As noted in the beginning there does not appear to be any direct authority in the American reports upon the question of the legality of the contract of a dentist to furnish a patient dental services for life. As previously noted, however, there is one very well-considered medical case, which upholds a contract of this kind, and appears of interest in connection with this discussion. Reference is made to Zeigler *vs.* Illinois Trust & Savings Bank Exr., 245 Ill. 180.

In this case a doctor entered into a contract with one of his patients whereby he agreed to furnish her medical services for life in consideration of the payment of $100,000 out of her estate after her death. The patient was a very wealthy lady, seventy-eight or seventy-

nine years old, and actively engaged in the management of her large property interests.

The contract was openly entered into at the patient's request and was not in any manner tainted with fraud. The doctor, on his part, attended his patient constantly during the period of the contract to the exclusion of his other patients. Upon the death of the lady the executor of her estate opposed the payment of the contract. The case reached the Illinois Supreme Court where in upholding the contract it was, in part, said:

It is urged that this contract is void chiefly for the reason that it furnishes an incentive to appellant [the doctor] to shorten the life of Mrs. McVicker by neglect, or improper treatment, or by the commission of the crime of murder. Each argument made by appellee [the executor] in support of this contention involves a breach of the contract, and is not founded upon the performance of it.

It cannot be seriously contended but that, in order to comply with the terms of this contract and be entitled to receive the benefits of it, the appellant was bound to give Mrs. McVicker the best treatment within his power and skill, and to prolong her life as long as possible. There can be no doubt that a con-

tract to commit murder or any other crime, ... is void, as against public policy. This contract does not contemplate the commission of a crime, or the doing of anything which is unlawful or contrary to good public morals. Even if it be conceded that the contract under its terms, offered some incentive to appellant to commit a crime, that would not necessarily render it void. . . .

In conclusion the Illinois Supreme Court reversed a judgment rendered in the appellate court denying the appellant's right to recover, and affirmed a previous judgment of the circuit court in favor of the appellant. Holding the contract valid and that the doctor was entitled to payment in full under his contract.

Summary.

From the foregoing reviews, it is apparent that there is a sharp difference of opinion, relative to the legality of the contracts of medical men to furnish their patients services for life, between the American and English courts. It is clear that a contract of that kind made by a physician or surgeon would not stand in England, and arguing from analogy, and in view of the tenor of the

language used in the English dental case reviewed, it seems too that such a contract made by a dentist would also be frowned upon in that country.

However, in the light of Zeigler *vs.* Illinois, etc., the American medical case reviewed, a contract fairly entered into by a physician or surgeon to attend a patient for life would be enforceable in this country. It follows that the same rule would no doubt apply in the case of a dentist who contracted to furnish a patient dental services for life. This of course assuming, as in the medical case reviewed, that the contract was free from any taint of fraud and fairly performed.